No. (1)
90-854

In The
Supreme Court of the United States

October Term, 1990

DONALD J. DIESEN,

Petitioner,

vs.

JOHN HESSBURG, THOMAS DALY,
AND THE DULUTH NEWS-TRIBUNE,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Minnesota

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QUESTIONS PRESENTED

1. Whether a defamation action by a public official plaintiff against a media defendant, based on a false implication arising out of true statements, is precluded by the First Amendment to the United States Constitution.

[Note: Petitioner represents that question 2 is appropriate for summary disposition or a remand to the Minnesota Supreme Court for reconsideration in light of this Court's decision in Milkovich v. Lorain Journal Co.]

2. Whether an investigative article that falsely implies a charge of misfeasance or malfeasance in office is an expression of opinion immunized by the First Amendment to the United States Constitution.

3. Whether common law malice evidence of bad motive and ill-will is relevant to the issue of actual malice and in resolving questions of credibility.

PARTIES TO THE PROCEEDINGS

Petitioner is Donald Diesen, the former Carlton County Attorney and admittedly a public official.

Respondents are John Hessburg, a former investigative reporter for the *Duluth News Tribune*, Thomas Daly, the former Executive Editor of the *Duluth News Tribune*, and the *Duluth News Tribune*, a newspaper of general circulation in northern Minnesota.

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OPINIONS BELOW

1. The May 5, 1988, Special Verdict containing the Jury's findings that the implication of the article was substantially false and that the article was published with a reckless disregard for the truth and willfully, maliciously, and with the intent to injure Petitioner is set forth in the Appendix at page 72A.

2. The May 23, 1988, Trial Court's Order for Judgment Notwithstanding the Verdict concluding that the article was

constitutionally protected opinion is unreported and is set forth in the Appendix at page 62A.

3. The March 28, 1989, unanimous decision of the Minnesota Court of Appeals reversing the Trial Court's Order and reinstating the Jury's verdict is reported as *Diesen v. Hessburg*, 437 N.W.2d 705 (Minn. App. 1989) and is set forth in the Appendix at page 48A.

4. The May 12, 1989, Minnesota Supreme Court Order granting Respondents' Petition for Discretionary Review is reported as *Diesen v. Hessburg*, 442 N.W.2d 781 (Minn. 1989) and is set forth in the Appendix at page 70A.

5. The May 11, 1990 Minnesota Supreme Court decision reversing the Court of Appeals, is reported as 455 N.W.2d 446 (Minn. 1990) and is set forth in the Appendix at page 1A.

6. The August 29, 1990 Minnesota Supreme Court order denying rehearing is an unreported order set forth in the Appendix at page 71A.

JURISDICTION

1. On August 29, 1990, the Supreme Court of Minnesota denied Petitioner's Petition for Rehearing. This constitutes the final order of the Supreme Court of Minnesota.

2. Jurisdiction to hear this Petition for Writ of Certiorari is conferred on this Court by 28 U.S.C.A. Section 1257(3) (1988).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The Fourteenth Amendment to the United States Constitution provides, in part:

No State shall . . . deprive any person of life, liberty or property, without due process of law.

STATEMENT OF THE CASE

A. THE FACTS

This action arose out of three lengthy articles (the article) published in the *Duluth News-Tribune* on November 15, 1981. They were written by Respondent John Hessburg and addressed the subject of battered women in Carlton County, a small county in northern Minnesota.

At that time, Petitioner was Carlton County Attorney. This position was elective and criminal prosecution was one of Petitioner's responsibilities.

This factual presentation will be brief because the facts are too convoluted to be easily summarized and because it is not necessary for this Court to resolve facts in order to rule on the legal issues presented.

The crux of this action is the legal effect of the implication arising from the article.

Two examples help illustrate the particular subtleties and nuances arising in a case of defamation by implication. These examples impact on several issues, including falsity, the defamatory element, actual malice and common law malice.

First, the article contained 4 paragraphs on the "Martin" case. It stated correctly that (1) Martin was charged with a felony for stabbing his wife with a knife; (2) that he had a prior criminal record; (3) that Diesen's office reduced the charge to a misdemeanor; (4) that he was sentenced to only 10 days in jail; and (5) that he had already been in jail that long so he was set free.

However, important facts were omitted. At trial, the officer who investigated the Martin case, Sergeant Randelin, testified that his investigation established that Martin did not stab his wife; she cut herself in a suicide attempt. Randelin testified that he explained to Hessburg that her accusation was false.

Hessburg testified that he never discussed the Martin case with Randelin, but the jury had reason to doubt Hessburg. The dissenting opinion identified Hessburg's lack of credibility:

> On the witness stand, Hessburg flatly denied discussing the Chip Martin case with Officer Randelin ("it wasn't discussed, period."). This denial, however, was promptly and totally impeached by Diesen's counsel through the use of Hessburg's previous deposition testimony which showed that Hessburg had discussed the Chip Martin case with Office Randelin. 455 N.W.2d at 466. Appendix p. 32A.

* * *

> This portion of Hessburg's testimony, along with the testimony which indicated that portions of Hessburg's taped interviews were missing and other portions had been rearranged, tends to support the jury's implicit conclusions regarding Hessburg's credibility. 455 N.W.2d at 466 n. 6. Appendix p. 32A.

The jury also heard testimony concerning Diesen's credibility. Randelin testified: "Don Diesen is the most honest man I have ever been associated with in my whole life and that's the truth."

The second example illustrates the difficulty involved in capturing nuances and trying to confine these slippery concepts under one comprehensive label.

Kathie Moore and LuAnn Dietrich, two women advocates, were quoted extensively in the article, including the following example:

> Diesen "is not going to prosecute unless the woman is on her deathbed." Dietrich declared. Kathie Moore, another Women's Shelter advocate who's had close dealings with Diesen and battered women from Carlton County said, "I know he's not doing his job with battered women.

> Women don't count (to him), particularly if they're married women. It's putting women back a hundred years into second-class citizenship again. A man like that does not belong in the public system."

Readers were not informed that Moore told Hessburg that she did not know Petitioner. Petitioner testified that he did not know Moore or Dietrich.

Readers also had no way of knowing that when the quoted statements were made, both women believed an accusation made by Jennifer Greensky. Greensky claimed to have been raped in 1973 when she was about 15 years old. Greensky told Hessburg, in the presence of both women, that Diesen interviewed her briefly in 1973 and that he made the crude remark, "Have you ever spread your legs like that before." Moore testified that she was "appalled" by this crude comment.[1]

Hessburg wrote an article on Greensky. The newspaper concluded, based on information supplied by Petitioner, that her accusation was false. There was no mention of Greensky in the published articles.

Respondents never advised the women that Greensky's accusation was fabricated.

At trial, Moore testified that she believed Greensky's accusation "then" (1981) and "now" (May, 1988). She stated no one ever told her why the Greensky article was not published.

Under Respondents' theory of the case, judicial application would be very simple. The quotations were accurate. Thus, the statements were true and there could be no reckless disregard for the truth because there was no falsity.

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[1]The record also contained evidence that prior to contacting Petitioner or otherwise investigating the truth of Greensky's fabrication, Hessburg used the fabrication to solicit opinions about Petitioner from other sources.

B. THE PROCEEDINGS

The trial was held in 1988, before a jury in Duluth, St. Louis County. The jury returned a special verdict in favor of Petitioner and those jury findings have never been challenged by Respondents.

Respondents challenged the false implication legal theory before the trial judge and also claimed that the article was constitutionally protected opinion. The trial judge granted Respondents' Motion for Judgment Notwithstanding the Verdict, holding that the implication conveyed by the article was constitutionally protected opinion. Petitioner appealed to the Minnesota Court of Appeals.

The Minnesota Court of Appeals determined that the article was not opinion and recognized that a public official plaintiff may bring a libel by implication action against a media defendant.

The Minnesota Supreme Court grated Respondents discretionary review and raised the issue on review as follows:

> Essentially we are asked to recognize a legal theory: whether a public official plaintiff may bring a libel by implication action against a media defendant, which is a question of law. 455 N.W.2d at 449. Appendix p. 5A.

On May 11, 1990, in a sharply divided decision, the Minnesota Supreme Court reversed the Court of Appeals decision.

The majority opinion (consisting of three of the seven Justices) declined to recognize the libel by implication legal theory by holding:

> Because the printed articles admittedly contained only true statements or opinion, and any implication therefrom was constitutionally protected criticism of a public official, there was no defamatory 'speech' as a matter of law. 455 N.W.2d at 452. Appendix p. 11A.

Although the majority was not as clear in its holding as it was in the phrasing of the issue, it appears that they not only relied, in part, on the *Gertz* opinion privilege, but also expanded that privilege to provide constitutional protection for all "criticism of a public official".

The specially concurring opinion of Justice Coyne accepted the libel by implication theory (but ruled against Petitioner on the malice issue.)

Thus, after a unanimous Court of Appeals decision in Petitioner's favor, the Justices of the Minnesota Supreme Court were split 3 to 3 on the libel by implication issue.

The seventh justice, Justice Simonett, agreed with the *result* reached by the majority, but his reasons were substantially different.

Justice Simonett's concurring opinion was premised on the belief that the "articulation of the defamatory implication is a question of law for the Court to decide." 455 N.W.2d at 455. Appendix p. 44A. He concluded that the implication was a vague derogation that Petitioner was a poor prosecutor, and that this type of charge would not be provable as false. That approach is different from the approach followed by the Minnesota Court of Appeals and by the other six justices of the Minnesota Supreme Court and appears to contradict the test used by this Court in *Milkovich*:

> The dispositive question in the present case then becomes whether or not a reasonable fact finder *could conclude* that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. (Emphasis supplied). *Milkovich v. Lorain Journal Co.*, ____ U.S. ____, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990).

What is significant, and what may warrant a summary reversal by this Court on this issue, was Justice Simonett's concession that he would rule in Petitioner's favor *if* the implication were phrased

as a charge of "malfeasance or misfeasance in office". Justice Simonett stated:

> If the defamatory implication was 'Diesen is guilty of malfeasance or misfeasance in office', as Diesen argues, then I think a jury could find that the defamation was false and Diesen could recover if he could also prove actual malice. 455 N.W.2d at 456. Appendix p. 47A.

Thus, three of the seven justices of the Minnesota Supreme Court specifically recognized the libel by implication theory. A fourth, Justice Simonett, seems to recognize the theory but, after rephrasing the implication, joined the majority in the result.

The minority decision (two of the seven justices) clearly embraced the false implication legal theory and chastised the majority for its ill-conceived holding:

> It must be understood by all that, with this decision, in Minnesota, a newspaper can publish a story *with actual malice* that (1) intentionally juxtaposes the facts in order to lead a reader to reach a preconceived defamatory conclusion not warranted by those facts and (2) omits significant facts that would lead to a different conclusion if those facts were not omitted. (emphasis in original) 455 N.W.2d at 470. Appendix p. 40A.

One of the dissenting justices, Justice Kelley, made reference to the majority opinion in a later decision:

> A majority of this court recently held that a commercial media defendant, who the jury found had done a "hatchet job" with constitutional malice on a public official through distortion and/or omission of established facts and through unwarranted inference, was immune from tort liability, unlike the rest of the citizens of this state, corporate or private, who would undoubtedly be liable in tort for that type of conduct. I joined the dissent of

Justice Yetka in that case. (citing *Diesen v. Hessburg*). *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, 206 (1990).

The Minnesota Supreme Court's decision was entered a few weeks after this Court heard oral arguments in *Milkovich*. On May 21, 1990, Petitioner petitioned the Minnesota Supreme Court for a rehearing, arguing, in part, that their decision should be delayed until this Court ruled in *Milkovich*.

The Minnesota Supreme Court delayed acting on the rehearing petition and, after receiving the *Milkovich* decision, ordered informal briefs, arguing the applicability of *Milkovich*.

Briefs were submitted on August 3, 1990. The Minnesota Supreme Court denied rehearing on August 29, 1990.

REASONS FOR GRANTING THE WRIT

I. THE MINNESOTA SUPREME COURT ERRED IN REFUSING TO RECOGNIZE THE LEGAL THEORY OF FALSE IMPLICATION LIBEL ACTIONS.

A. Introduction

Masson v. New Yorker Magazine, Inc., 895 F.2d 1535 (9th Cir. 1989), cert. granted 111 S.Ct. 39 (Oct. 1990) presently under review by this Court, addresses, in the context of malice, the fundamental issue of truth in a libel action. This case addresses the same issue, but from a different perspective.

It is well recognized that "the rule that makes truth relevant to the 'gist' or 'sting' of the publication protects the defendant who has got the details wrong but the 'gist' right; but it also works in reverse, to impose liability upon the defendant who has the details right but the 'gist' wrong." W. Prosser and W. Keeton, *The Law of Torts*, Section 116A (Supp. 1988).

In considering the effect of alleged fabricated quotations in *Masson*, it appears that this Court will address the first part of Prosser's postulation. This case is the mirror image of *Masson* and presents an attractive vehicle to analyze the second part.

The majority opinion recognized Prosser's postulation, but stated:

> ...this reference is to common law libel in the absence of the constitutional concern for fair comment on public officials. The United States Supreme Court has established an important distinction between private and public official plaintiffs for defamation purposes.[2] 455 N.W.2d at 450. Appendix p. 6A.

Thus, the Minnesota Supreme Court found a separate standard of falsity for public officials in defamation cases based on the rationale underlying the malice requirement, set forth in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

In *Milkovich*, this Court stated that existing constitutional doctrine secured adequate breathing space that freedoms of expression require. Petitioner asks this Court to review yet another constitutional protection that has reared its head in Minnesota, and in the 8th Circuit[3], but that seems to be in conflict with the decisions of this Court.

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[2]The opinion, later in its analysis, also stated, "...we note our decision here is rooted in state defamation law." This prompted a rejoinder in the dissenting opinion:

> This is an obvious attempt to shield the majority decision from review by the United States Supreme Court. The majority opinion is unquestionably an extension of the *Gertz* dictum and, as such, rests solely on a determination of federal law (i.e. a pretended federal defense to a state law claim). 455 N.W.2d at 464. Appendix p. 28A.

[3]*Price v. Viking Penguin Inc.*, 881 F.2d 1426 (8th Cir. 1989) cert. denied 1101 S.Ct. 757 (1990) ("We do not recognize defamation by implication.").

B. Conflicts with Rulings of This Court

This Court has, in two recent cases, raised the issue of false implication defamation actions without specifically reaching a holding.

In *Harte-Hanks Communications, Inc. v. Connaughton*, ___ U.S. ___, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989), this Court apparently phrased the defamatory statement as an implication. It appears that this Court approved the lower court's observation that: "The article was defamatory in its *implication* that Connaughton was an unethical lawyer and an undesirable candidate...." (emphasis supplied) 109 S.Ct. at 2683 n. 3.

In *Milkovich v. Lorain Journal Co.*, ___ U.S. ___, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), this Court suggested that a public official could maintain a false implication libel action:

> Thus, where a statement of opinion on a matter of public concern reasonably *implies* false and defamatory facts regarding public figures or officials, those individuals must show that the statements were made with knowledge of their false implications or with reckless disregard of their truth. (emphasis supplied). 110 S.Ct. at 2706, 2707.

Although the Minnesota Supreme Court was made aware of both *Harte-Hanks* and *Milkovich*, it was guided, instead, by the 8th Circuit decision in *Price v. Viking Penguin, Inc.*, 881 F.2d 1426 (8th Cir. 1989), cert. denied 1101 S.Ct. 757 (1990).

C. Conflicts Between Lower Courts

The decision below is in conflict with decisions of the U.S. Circuit Courts of Appeal which themselves are either in conflict or apply different standards in resolving defamation issues.

The conflict most pertinent to Petitioner's case is between the 7th and 8th Circuits.

The Minnesota Court of Appeals relied mainly on *Brown and Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), cert. denied 108 S.Ct. 1302 (1988). In reversing, the Minnesota Supreme Court made no mention of this case and instead relied on *Price v. Viking Penguin, Inc.*, 881 F.2d 1426 (8th Cir. 1989), cert. denied 1101 S.Ct. 757 (1990).

In *Price*, the 8th Circuit held that "We do not recognize defamation by implication" in affirming summary judgment against a public figure. 881 F.2d at 1432. On the issue of falsity, the *Price* Court stated that "To reverse this judgment, we must find that Price could show that precise factual statements were false." 881 F.2d at 1432. As authority for this statement, the 8th Circuit erroneously cited *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986).[4]

The 8th Circuit and the Minnesota Supreme Court appear to be in the forefront in erecting constitutional barriers in the path of public official plaintiffs in defamation cases.

In *Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309 (7th Cir. 1988), the 7th Circuit addressed the exact issue raised by Petitioner. In a lengthy, well-reasoned discussion, it rejected the 8th Circuit-Minnesota position, as shown by the following excerpts:

> The district court, however, would erect yet another barrier to the maintenance of a libel suit by a public official. A requirement that allegedly defamatory statements specifically and explicitly libel the Plaintiff denies a public official the opportunity to demonstrate defamatory inferences that are as clear and perhaps more damaging because of their unlimited nature than even

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[4]This was pointed out in the dissenting opinion in *Diesen*. "A close review of *Philadelphia Newspapers* indicates that the *Price* Court misinterpreted *Philadelphia Newspapers*. The cited portion of *Philadelphia Newspapers* does not say anything that can reasonably be interpreted as requiring 'precise factual statements.'" 455 N.W.2d at 463. Appendix p. 26A. *Philadelphia Newspapers* is silent as to how a Plaintiff may prove falsity, that is, whether falsity may be proved by implication.

explicitly defamatory charges....Such a rule goes too far.... 841 F.2d at 1314.

* * *

A legal fiction denying the existence of clearly discernable, though not explicit charges, exposes public officials to baseless accusations and public mistrust while promoting an undisciplined brand of journalism both unproductive to society and, as we see it, unprotected by constitutional considerations. 841 F.2d at 1317.

Other circuits have also addressed the issue of defamation by implication.

In *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. July 13, 1990), the Plaintiff was a public figure and there were two media Defendants. The Court recognized:

This case draws us into an area fraught with subtle complexities: the law of defamation by implication. 909 F.2d at 518.

* * *

Adding to the complexity of this case is the fact that the reports at issue contain materially true accounts of what transpired. 909 F.2d at 518.

The Court noted that, in order to prove that the publication was defamatory, the language used must, as a matter of law, be reasonably capable of a defamatory interpretation. But in order for a defamatory meaning to be actionable, there must be some affirmative evidence suggesting that the defendant intended or endorsed the defamatory inference. Examples given were suggestive juxtapositions, turns of phrase, or incendiary headlines.

The Court said that omissions were relevant on the issue of falsity, but could not supply the defamatory element which must

appear from the text standing alone. The Court did not reach the question of whether omissions could give rise to a cause of action for defamation.

The media defendants in *White* sought to obtain the same result allowed by the 8th Circuit and Minnesota, but through a different avenue of attack.

> The media defendants also claim a right under the First Amendment to report accurately allegations of wrongdoing in a matter of public interest, even where the allegations are made outside of an official proceeding. The premise of this privilege, they claim, is that accusations of malfeasance by public officials are newsworthy, and the public will only learn of such charges if the press is immune from liability for dispassionate and disinterested reporting of such allegations. While the Second Circuit has recognized a constitutional privilege of "neutral reportage", see *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113, 120 (2nd Cir.), cert. denied, 434 U.S. 1002, 98 S.Ct. 647, 54 L.Ed2d 498 (1977), this circuit has not. 909 F.2d at 528.

In *Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069 (3rd Cir. 1988), the Court, in a case involving public figure Plaintiffs, recognized false implications, stating: "The truth must be as broad as the defamatory imputation or "sting" of the statements." 847 F.2d at 1084. It also stated that a jury could find that defendants knew the implication was false and that they intended that implication.

The 9th Circuit recently considered a false impression libel action in *Newton v. National Broadcasting Co.*, 913 F.2d 652 (9th Cir. 1990). The District Court recognized the legal theory of false impression libel actions and entered judgment in Newton's favor. *Newton v. National Broadcasting Company, Inc.*, 677 F.Supp. 1066 (D.Nev. 1987).

The 9th Circuit reversed the District Court's order finding that actual malice had not been established by clear and convincing

evidence. The 9th Circuit discussed whether there had been proof that the journalists intended to convey the false implication that the trial court found to be "clear and inescapable." The 9th Circuit concluded that the District Court erred because it applied a negligence standard in ruling on what the reporters should have foreseen.

The 9th Circuit recognized that the element of falsity can be established in a false impression libel action. However, in order to prove malice, there must be proof that the publisher knew of the implication being conveyed.[5]

In *Healey v. New England Newspapers, Inc.*, 555 A.2d 321 (R.I. 1989), cert. denied 110 S.Ct. 63 (R.I. 1989), the Rhode Island Supreme Court unanimously affirmed a judgment where the falsity element was based entirely on evidence of omission of material facts. The Court approved the following jury instruction:

> If you find that the reporter had available to him facts that he failed to reveal, and the disclosure of these facts would have ensured that a reasonable person could not have construed the existing facts in a manner which reflected negatively on Dr. Healey, you may find that the Defendant defamed the Plaintiff. 555 A.2d at 324, 325.

Petitioner, and the Minnesota Court of Appeals, placed considerable reliance on *Memphis Publishing Co. v. Nichols*, 569 S.W. 2d 412 (Tenn.S.Ct. 1978), which recognized falsity by implication in an action involving private party plaintiffs.

Respondents, and the majority below, relied on a number of cases holding that where public officers and public affairs are concerned, there can be no libel by innuendo and that true

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[5]In Petitioner's case, this is not an issue. The executive editor, the managing editor, and the publisher all acknowledged that they knew, prior to publication, that the articles charged Diesen with misfeasance or malfeasance in office. In fact, the implication was originally articulated by the newspaper's attorney in a letter sent to the publisher prior to publication.

statements are not defamatory regardless of the tone or innuendo evident.

These cases have been erroneously applied to Petitioner's case because they are either qualified by the requirement that there be no omission of material facts[6], or because they involve a failure to prove the defamatory element (i.e., that the innuendo does not reasonably convey a defamatory connotation).

Three cases cited by the majority below illustrate these two categories.

First, in *Pietrafeso v. D.P.I, Inc.*, 757 P.2d 1113 (Colo. Ct. App. 1988), the Court, after stating that it had examined decisions from other jurisdictions because of the lack of precedent in Colorado, stated:

> These jurisdictions have uniformly held that if the statements are true, or substantially true, and there are no undisclosed material facts in an action involving a public figure, there can be no libel by innuendo. 757 P.2d. at 1116.

This language is self-contradictory. To say that "if a statement is true, or substantially true, and there are no undisclosed material facts..." fails to recognize that the omission of material facts must be considered in determining whether a statement is true or substantially true.

Second, *Strada v. Connecticut Newspapers, Inc.*, 477 A.2d 1005 (Conn. 1984), was relied on by Respondents as a case not recognizing the false impression legal theory. The holding in *Strada*, however, was premised on a finding that no material facts had been omitted from the article. Because of its recognition of an exception when material facts are omitted, each side considers *Strada* a weapon in its own arsenal.

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[6]The jury's finding in the instant case that the implication of the articles was substantially false has never been challenged by Respondents. Respondents challenged only the legal question of whether falsity can be established by implication or innuendo.

Third, in *Cibenko v. Worth Publishers, Inc.*, 510 F.Supp. 761 (D.N.J. 1981), a college sociology textbook contained a picture of a policeman (the Plaintiff) prodding a black man with a nightstick in a public place along with a caption posing the question of whether he would treat a well-dressed white man the same way. The Plaintiff was not identified and no factual statement accompanied the photograph. Only a rhetorical question was posed. The *Cibenko* court held that plaintiff failed to establish the defamatory element of his case. Even though the holding in *Cibenko* was premised on a failure to prove the defamatory element of plaintiffs case, the majority in *Diesen* cited *Cibenko* in support of its ruling on falsity: "Other jurisdictions have also specifically declined to allow a public official to prove *falsity* by implication where the challenged statements are true." (Emphasis added). 455 N.W.2d at 451. Appendix p. 9A.

Petitioner's case illustrates how a lower court error on an important issue, if left undisturbed, can cause a ripple effect of subsequent errors in other courts.

A misreading of *Hepps* by the 8th Circuit in *Price* (that precise factual statements must be shown to be false) was followed by the Minnesota majority. Lending apparent credence to this position were several overly-simplistic decisions holding that if statements about a public official are true, there can be no libel by innuendo.

Thus, it is not surprising that errors and conflicts multiply. This area of the law has become a judicial version of the Gordian knot. Petitioner's case offers a sword to this Court to sever it in a single stroke and to provide some badly needed clarification of the law of defamation.

D. The Importance of the Issue

As a result of these conflicting opinions, the national news media has expressed concern about the uncertainty of the law in this area. For example, the *Wall Street Journal* contained articles on May 14 and May 15, 1990 commenting on the *Diesen* decision. In the May 14 issue, it stated:

> The decision by the Minnesota Court had been eagerly awaited by First Amendment experts because the case involved claims that a news report created a false impression. Most plaintiffs in libel cases allege specific factual inaccuracies.
>
> * * *
>
> In a lengthy dissent, Justice Lawrence Yetka appeared to invite the high court to review the case. The decision, he wrote, 'virtually closes the door to a public official for any recovery.'

In its May 15 edition the *Wall Street Journal* stated:

> For media companies, the truth has long been considered the best defense in a libel suit. But it may not be enough any more.
>
> In a growing number of cases, public figures are suing on grounds that an article created a false impression, even if each statement taken separately was true. And recently, juries have shown a willingness to grant big awards in such cases.
>
> * * *
>
> Courts have ruled both ways on the issue, and the Supreme Court has never expressly ruled on liability in false impression cases. But the high court may get a chance to decide the issue in a closely-watched case against the *Duluth, Minn. News-Tribune* that Minnesota's Supreme Court ruled on last week.

Petitioner suggests that these comments from the *Wall Street Journal* indicate that the national news media is concerned about

the unsettled state of the law in the area of public official false impression defamation actions.

More importantly, the unsettled state of the law in this area is causing substantial confusion in the judicial system, not only on the falsity issue, but also on the malice issue. The malice inquiry is significantly different if the falsity is by implication rather than express.

Falsity is a prerequisite to consideration of the issue of malice. A failure to prove the element of falsity, for whatever reason, destroys a defamation action. Thus, to continue with a malice inquiry in the absence of a finding of falsity is a gratuitous exercise that results in uncertainty and confusion.

The majority below, after not recognizing falsity by implication as a matter of law, proceeded with a malice inquiry in the absence of a legally cognizable falsity.

Uncertainty and confusion resulted because it was not clear what falsity yardstick they applied. Presumably they addressed malice from the perspective of whether there was a reckless disregard for the literal accuracy of the article. If so, this approach misses the mark and the result is a foregone conclusion. Petitioner never challenged the trial court's ruling that the individual statements were true.

Petitioner contends that the majority should have addressed malice from the perspective of whether there was a reckless disregard for the truth or falsity of the implication. From this perspective, evidence ignored by the majority becomes extremely important.

Respondents admitted concern over the whole series of stories prior to publication. Those concerns were summarized in a letter by the newspaper's attorney, John Killen.

> You have also indicated that the versions which we have reviewed have been sharply edited from the original drafts of the reporter who worked on the story. This reporter is no longer with the newspaper and has been terminated, as I understand it, because you questioned his objectivity. You have indicated that you are satisfied

> that the original material which he submitted could lead an outside observer, such as a juror, to conclude that the reporter became so personally involved in the story and the material as to be possibly accused of malice toward Diesen.
>
> The real question is whether such an apparent attitude on the part of the reporter has poisoned the whole series of stories.

In its malice inquiry, the majority below noted that quotations and documents were rechecked and interviews and notes were reviewed. This is relevant only as to literal accuracy. Justice Simonett pinpoints the proper focus in his observation that in spite of concerns about the reporter, the editors elected only to edit and recheck the facts insofar as reported by Hessburg without knowing if there were other facts or circumstances which would tell a different story.

The editing efforts at the newspaper were directed not at eliminating poison but at determining how large and how potent the dose of venom should be.

If falsity by implication is recognized, as urged by Petitioner, the malice holding of the majority below is fatally flawed by use of the incorrect falsity standard.

This Court is presented with two definitions of truth contending for supremacy as the proper standard in defamation actions. Resolution of the issue of which definition of truth governs will impact on consideration of both the falsity issue and the interrelated issue of malice.

E. Appropriateness of This Case

This case presents an appropriate vehicle for consideration of the question presented for the following reasons.

First, the issue is narrowly stated in the majority opinion ("Whether a public official plaintiff may bring a libel by implication action against a media defendant.").

Second, the issue is not dependent on any factual interpretations. The majority clearly stated that it was applying a "de novo" standard of review.

Third, the positions adhered to by Petitioner and Respondents are summarized in the majority decision and the majority accepts Respondents' theory (the test on falsity and malice is literal accuracy) while the dissenting opinion accepts Petitioner's theory (the focus on both falsity and malice is on the implication of what was published).

Fourth, Respondents conceded, at trial, that they knew what the implication was prior to publication which removes any concern about a "hidden innuendo" or "secret meaning" that has plagued other courts.

Fifth, the outcome is dependent on resolution of the question of law. If constitutional concerns preclude a libel by implication action by a public official, then the result reached by the majority is sound. If a public official may bring a libel by implication action against a media defendant, then the analysis in the dissenting opinion is correct.

II. THE MINNESOTA SUPREME COURT ERRED IN APPLYING AND EXTENDING AN OPINION PRIVILEGE TO ALL CRITICISM OF PUBLIC OFFICIALS.

The competing opinions, in the decision below, suggest that the majority decision may be based, in part, on its misapplication of the pre-*Milkovich* opinion privilege. The majority recognized that, in a common law defamation action, a defendant may be held responsible for the defamatory implication even though the facts are accurate. The majority states, however:

> This reference is to common law libel in the absence of the constitutional concern for fair comment on public officials. The United States Supreme Court has established an important distinction between private and

> public official plaintiffs for defamation purposes. 455 N.W.2d at 450. Appendix p. 8A.
>
> * * *
>
> To further safeguard speech, the Supreme Court has held expressions of opinion are not actionable statements for defamation purposes and are protected by the First Amendment. *Gertz*, 418 U.S. at 339-40. 455 N.W.2d at 450. Appendix p. 8A.
>
> * * *
>
> Because the Supreme Court has provided only limited guidance on this issue, "the lower federal courts and state courts have, not surprisingly, fashioned various approaches in attempting to articulate the Gertz-mandated distinction between fact and opinion." (citing *Ollman v. Evans*), 455 N.W.2d at 451. Appendix p. 8A.

The majority clearly imposed a greater burden on a public official in proving the falsity element by relying on *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and may have adopted (and expanded) the claimed pre *Milkovich* opinion privilege to provide constitutional protection for any "criticism of a public official."

The dissenting justices interpreted the majority decision as refusing to accept the false implication theory, in part, because the implication was an opinion; with the definition of opinion encompassing all criticism of public officials. The minority commented:

> Yet, says the majority, the newspapers cannot be sued for libel in Minnesota because 'there is no such thing as a false idea' and, therefore, we do not recognize falsity by implication.

> I doubt that the United States Supreme Court ever intended such a result by its decisions in *New York Times v. Sullivan* and *Gertz v. Robert Welch, Inc.*, 455 N.W.2d at 470. Appendix p. 40A.

While the question of whether the First Amendment provides immunity for statements of opinion was answered in *Milkovich*, the question of whether a statement is provable as false remains.

This latter issue can quickly be laid to rest in Petitioner's case. Respondents conceded that the article was factual. They stated:

> It is true, as the Court of Appeals notes, that Appellants [Respondents] consider the articles to be fact, not opinion.
>
> Appellants [Respondents] have always maintained that the articles themselves were factual. The trial court ruled that the published facts were true. Thus, the fact/opinion distinction is meaningless when applied to the articles themselves. (Appellants [Respondents] Brief to the Minnesota Supreme Court).

The Court below, nevertheless, applied the four-factor fact/opinion test first articulated in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127, 105 S.Ct. 2662, 86 L.Ed.2d 278 (1985). Its entire analysis was as follows:

> The allegedly false implication here arguably was unspecific and unverifiable. The articles, however, contained quotations and opinions both favorable and unfavorable to Diesen, as well as cautionary language, and two of the three articles were printed in the editorial section of the *News-Tribune*. Under this analysis, then, the challenged speech was protected opinion. 455 N.W.2d at 451. Appendix p. 8A.

This was not an evidentiary determination. It was the pronouncement of opinion by judicial fiat.

Petitioner admits to being confused by the majority opinion. In their discussion of falsity, they have invoked both the *New York Times* actual malice standard and apparently the pre-*Milkovich* opinion privilege.

The charge of misfeasance or malfeasance is, as a matter of law, provable as false.[7] That charge was proved to be false as evidenced by the unchallenged jury finding. Because the majority decision appears to have been based, at least in part, on an expanded pre-*Milkovich* opinion privilege, Petitioner requests a summary disposition on this issue or a remand to the Minnesota Supreme Court for reconsideration in light of *Milkovich*.

III. THE MINNESOTA SUPREME COURT ERRED BY REFUSING TO CONSIDER EVIDENCE OF COMMON LAW MALICE.

In discussing malice, the majority below said:

> Further, any ill will Hessburg may have had toward Diesen is irrelevant to the actual malice inquiry. E.g., *Harte-Hanks*, ___ U.S. at ___, 109 S.Ct. at 2685 n. 7 ("actual malice" is unfortunately confusing in that it has nothing to do with bad motive or ill will"). 455 N.W.2d at 453. Appendix p. 12A.

The majority, however, overlooked three other references on this point in *Harte-Hanks*.

> It also is worth emphasizing that the actual malice standard is not satisfied *merely* through a showing of ill

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[7]Otherwise, every statute containing these general terms as grounds for removal of a public official from office would necessarily be invalid.

will or "malice" in the ordinary sense of the term. (Emphasis added). 109 S.Ct. at 2685.

* * *

The trial judge correctly instructed the jury that "actual malice may not be inferred *alone* from evidence of personal spite, ill will or intention to injure on the part of the writer. (Emphasis supplied). 109 S.Ct. at 2685 n. 7.

* * *

. . . It cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry. 109 S.Ct. at 2686.

The record contained substantial evidence of bad motive and ill will. In selecting one reference in *Harte-Hanks* to the exclusion of the other three, the majority erred in ignoring important evidence bearing upon actual malice.[8]

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[8]The jury found common law malice by clear and convincing evidence, a finding that has never been challenged. The dissent below, after a lengthy discussion of the malice evidence, stated:

> The above summary of the record demonstrates that the jury considered evidence sufficient to support a conclusion that the newspaper entertained serious doubts or had obvious reasons to doubt the truth of the reports, especially the Chip Martin and Kathy Berglund stories. Accordingly, the majority's decision reversing the jury's conclusion as to actual malice unreasonably discounts the value of the jury's opportunity to observe the demeanor of the witnesses, a factor that is significant in determining whether a Defendant had a particular subjective state of mind. It seems to me that the newspaper's conduct in the present case is precisely the type of conduct the United States Supreme Court condemned in *Harte-Hanks*. 455 N.W.2d at 469. Appendix p. 40A.

(footnote continued on next page)

By ignoring evidence of common law malice, the majority also erred in reviewing credibility issues. The dissenting opinion charged that the majority failed to follow *Harte-Hanks* by not reviewing credibility determinations under the clearly erroneous standard:

> The jury's decision in this case was undoubtedly based on its assessment of credibility. 455 N.W.2d at 468. Appendix p. 37A.
>
> * * *
>
> This case involved lengthy testimony, much of it conflicting, by a number of witnesses. 455 N.W.2d at 469. Appendix p. 39A.

The majority's analysis of the actual malice element was flawed for three reasons. First, its analysis focused only on whether there was a reckless disregard for the literal accuracy of what was published. Second, it considered evidence of ill will to be "irrelevant." Third, it applied the wrong standard in resolving credibility issues.

For these reasons, Petitioner requests that if certiorari is granted on question one, this Court also review the malice ruling.

After noting that *Harte-Hanks* said that "If a false and defamatory statement is published with knowledge of falsity or a reckless disregard for the truth, the public official may prevail" the dissent stated: "In Minnesota, however, this is not true any longer." 455 N.W.2d at 470. Appendix p. 40A.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted. Petitioner reiterates that Question Two is presented as an issue that was resolved by this Court in *Milkovich*; a decision that was entered after the decision of the Minnesota Supreme Court but prior to the Minnesota Supreme Court's denial of Petitioner's request for a re-hearing. Further, Question Three is presented as an issue that was resolved by this Court in *Harte-Hanks*, as recognized in the dissenting opinion in *Diesen*, but overlooked by the majority.

Respectfully submitted,

COLLINS, BUCKLEY, SAUNTRY & HAUGH

Dated: Nov. 29, 1990

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STATE OF MINNESOTA

IN SUPREME COURT

C2-88-1345

Court of Appeals

Popovich, C.J.
Dissenting, Yetka, Kelley, JJ.
Concurring specially,
Simonett, Coyne, JJ.

Donald J. Diesen,

Respondent,

vs.

Filed May 11, 1990
Office of Appellate Courts

John Hessburg, et al.,
petitioners,

Appellants.

SYLLABUS

1. An allegedly false implication arising out of true statements is generally not actionable in defamation by a public official against a media defendant.

2. The record failed to establish actual malice with convincing clarity where media appellants verified sources, complied with journalism standards for reporting and editing, and did not publish the speech with reckless disregard for its truth.

Reversed.

Heard, considered and decided by the court en banc.

OPINION

POPOVICH, Chief Justice.

On November 15, 1981, the Duluth News-Tribune published three articles concerning battered women that were critical of the job performance of the Carlton County Attorney, Donald Diesen, in prosecuting domestic abuse. Diesen sued the News-Tribune, its executive editor, Thomas Daly, and the reporter who wrote the articles, John Hessburg, for libel. The jury found by special verdict the articles' implication was substantially false, appellants published the articles with actual malice, and awarded Diesen $285,000 in compensatory and $500,000 in punitive damages. The trial court granted appellants' motion for judgment notwithstanding the verdict (JNOV), holding a libel action by a public official cannot be based on a false implication arising from true facts, and any implication from the articles was constitutionally protected opinion. A Minnesota Court of Appeals panel reversed and reinstated the jury's verdict. Diesen v. Hessburg, 437 N.W.2d 705, 712 (Minn. App. 1989). We reverse.

I.

In the spring of 1981, John Hessburg, a reporter for the Duluth News-Tribune, was assigned to investigate a complaint received by the newspaper that Carlton County was lenient in prosecuting men who battered women. Hessburg met with victims of domestic abuse and advocates for battered women, examined Initial Complaint Reports (ICRs) in Carlton County, and developed flow charts detailing the dispositions of the 44 ICRs that involved domestic assaults. Hessburg interviewed Donald Diesen, who was then Carlton County Attorney, as well as other law enforcement and judicial officials, and several local attorneys. From the outset, Hessburg referred to the investigation as "the Diesen probe." Diesen and the Duluth News-Tribune exchanged a series of correspondence regarding the investigation. Diesen informed the newspaper that Hessburg was making false accusations about him, asked to meet with someone from the paper other than Hessburg, and requested a transcript of his interview with Hessburg. These requests were denied in accordance with the Duluth News-Tribu-

ne's policy and consistent with standard journalism practice.

Two Duluth News-Tribune city editors verified the file dispositions and information used by Hessburg. One editor also reviewed tapes of Hessburg's interviews. Although this review indicated Hessburg asked leading questions and had become "deeply, emotionally involved in" the investigation, the editor could find no inconsistencies between the interviews and what Hessburg had written. The News-Tribune decided not to publish articles concerning two battered women because they could not be independently confirmed. The News-Tribune's attorney reviewed the articles prior to publication and opined the material was not libelous because "[t]he material appears to be well documented and well within the area of permitted criticism of the court system and those who run it." The three articles that appeared in the Duluth News-Tribune on Sunday, November 15, 1981 were: Is justice denied battered women in Carlton County?; Justice denied? The case of Kathy Berglund; and County Attorney Donald Diesen: Critics say he's not tough on domestic abuse. Diesen's demand for a retraction was denied by the News-Tribune. Although Diesen was defeated in the 1982 election for Carlton County Attorney, the articles were not used in the campaign.

Diesen brought a libel action against Hessburg, Daly, and the Duluth News-Tribune (collectively "Newspaper"), alleging the articles defamed him. Appellants sought summary judgment as to those portions of the articles admitted by Diesen in his deposition to be favorable, balanced, true or opinion. The trial court denied the motion and held Diesen could proceed under the implication theory. Appellants' second summary judgment motion, which contended the absence of any evidence tending to show actual malice, was denied. A third summary judgment motion, arguing the trial court applied an incorrect summary judgment standard regarding actual malice, was also denied. Appellants then brought a motion in limine to strike those portions of the articles admitted by Diesen not to be false or libelous, which was denied.

Several of the victims, battered women's advocates and attorneys testified at trial the articles quoted them or reflected their stories accurately. Supporters of Diesen, such as Sheriff Twomey

and Sergeant Randelin, also testified that quotations attributed to them in the articles were fair and accurate. At trial Diesen answered, for example, "true," "opinion," "O.K." or "fair," in response to an extensive, paragraph by paragraph cross-examination of the published articles. While the editors and publisher acknowledged the articles impliedly charged Diesen with malfeasance or misfeasance, they also testified to their belief the articles were true. The only expert witness called, Journalism Professor Ralph Hollsinger of Indiana University, testified the newspaper did not violate any journalism standards in reporting, editing or publishing the articles.

After Diesen rested, appellants moved for a directed verdict, which the trial court denied. The court also denied appellants' motion to prohibit Diesen's punitive damages claim. At the close of all the evidence, appellants again moved for a directed verdict, to which the trial court responded, "The Court would be inclined to either grant a judgment notwithstanding the verdict in favor of the defendant, or * * * may upon receipt of an unfavorable verdict to the defendant, grant the [directed verdict] motion that has now been requested by the defendant."

The trial court held as a matter of law that all statements in the articles were true and so instructed the jury. By special verdict, the jury found:

> [T]he implication of the articles published by Defendants [was] substantially false ***
>
> Plaintiff [did not] demonstrate by clear and convincing evidence that the Defendants knew that the implication of the articles was substantially false * * *
>
> Plaintiff prove[d] by clear and convincing evidence that the Defendants published the articles with reckless disregard as to the truth or falsity of the implication of said articles.

The jury then awarded Diesen $285,000 in compensatory damages

and $500,000 in punitive damages. Appellants moved the trial court for JNOV or a new trial. The trial court granted JNOV, ruling that the alleged implication was too vague to be actionable; "[t]here can be no libel by innuendo if the challenged communication is true and concerns public officers and public affairs even though a false implication may reasonably be drawn"; and "the implication arising from the articles" was constitutionally protected opinion. Diesen appealed.

A Minnesota Court of Appeals panel reversed and reinstated the jury's verdict, holding known facts were omitted from the articles that created a false implication; the record supported the finding of actual malice; and the statements implying Diesen's malfeasance or misfeasance were not constitutionally protected opinion. Diesen v. Hessburg, 437 N.W.2d 705, 710-12 (Minn. App. 1989). We granted further review to Hessburg, Daly and the Duluth News-Tribune and now reverse.

II.

Granting a JNOV is a question of law subject to de novo review. See Edgewater Motels, Inc. v. Gatzke, 277 N.W.2d 11, 14 (Minn. 1979). Essentially we are asked here to recognize a legal theory: whether a public official plaintiff may bring a libel by implication action against a media defendant, which is a question of law. See W. Prosser & W. Keeton, The Law of Torts § 3, at 18-19 (5th ed. 1984) (hereinafter "Law of Torts"). Thus, we conduct an independent review of the record before us. Appellants Hessburg, Daly and the Duluth News-Tribune urge us to reject the libel by implication theory because it allows a plaintiff to avoid proving the falsity of alleged defamatory statements. Generally, a plaintiff must prove publication of a false and defamatory statement to prevail in a libel action, with truth being an affirmative defense to such a claim. Id. § 116, at 839. Here, however, the trial court found the statements in the articles to be true as a matter of law. Respondent Diesen argues the articles are actionable because their implication, Diesen's misfeasance or malfeasance

regarding prosecution of domestic abuse, was false.

The jury found "the implication of the articles published by Defendants [was] substantially false." The court of appeals panel concurred due to the following omissions in the Berglund article:

> The article correctly states that Diesen plea bargained the felony assault charge to a misdemeanor. However, the article failed to mention that Kathy Berglund had told the assailant's probation officer that she believed chemical dependency treatment was more appropriate for Melvin Defoe, the assailant. The article also neglected to mention that Diesen had requested jail time for Defoe. The article also failed to mention that Berglund admitted that she was unwilling to go through any court process at that point in time. * * * By the omission of these facts, the reader is left with the view that even though Berglund was severely assaulted by this man, Diesen did not believe it merited felony prosecution * * *.

Diesen, 437 N.W.2d at 708. Berglund, however, testified at trial she "wanted him prosecuted" rather than just getting treatment for DeFoe. She also testified she "never dropped the action," but she could not get a response from Diesen after numerous attempts. In addition to those noted by the court of appeals panel, Diesen cites other minor "omissions and distortions," involving, for instance, the Chip Martin story. These omissions, considering the totality of the articles, would have had no material effect in changing the thrust and tenor of the articles. Moreover, even if facts were omitted from the published articles, arguably such organizing and editing of the articles were within the Newspaper's discretion. See, e.g., Strada v. Connecticut Newspapers, Inc., 193 Conn. 313, 326, 477 A.2d 1005, 1012 (1984).

While Prosser recognizes "if the defendant juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts, he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct," Law of Torts

§ 116 (Supp. 1988) (footnotes omitted), this reference is to common law libel in the absence of the constitutional concern for fair comment on public officials. The United States Supreme Court has established an important distinction between private and public official plaintiffs for defamation purposes. Greater constitutional protection is afforded speech about public officials' public conduct and other matters of public concern than that of a strictly private nature because of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, [although] it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); see also Rose v. Koch, 278 Minn. 235, 254, 154 N.W.2d 409, 423, (1967).

The subjects of the three articles, the treatment of battered women and the county attorney's job performance, are matters of public concern. Diesen, as county attorney, was a public official and as such, "runs the risk of closer public scrutiny than might otherwise be the case." Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974). This scrutiny is considered a necessary and positive element of our democracy and, as a result, a public official may suffer injury to his or her professional reputation without recovery under defamation law because of the paramount free speech and free press rights at stake. Public officials also are given less protection because they "generally have some access to a public medium for answering disparaging falsehood[s], whereas private individuals do not." Law of Torts § 113, at 805.

As a public official, Diesen had a natural forum to explain the functioning of his office and to counter the thrust of the articles. Although Diesen demanded a retraction from the Newspaper, which was denied, he did not avail himself of other avenues, such as holding a news conference. He did, however, submit comments to other local papers, the Cloquet Pine Knot and the Moose Lake Star and Gazette, which published editorials favorable to him. It is interesting to note the average circulation in Carlton County for the Sunday Duluth News-Tribune in 1981 was 6,829, while the figures for the Cloquet Pine Knot and the Moose Lake Star and

Gazette were 5,650 and 3,400 respectively. Also, although Diesen was defeated in the next election for county attorney, the subject articles were not part of his or his opponent's campaign. Indeed, it was not a very close election since Diesen's opponent won by an approximate 3,000 vote margin. Moreover, evidence at trial indicated opinions generally of Diesen did not change as a result of the articles.

To further safeguard speech, the Supreme Court has held expressions of opinion are not actionable statements for defamation purposes and are protected by the first amendment. Gertz, 418 U.S. at 339-40.

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Id. (footnote omitted). Because the Supreme Court has provided only limited guidance on this issue, "the lower federal courts and state courts have, not surprisingly, fashioned various approaches in attempting to articulate the Gertz-mandated distinction between fact and opinion." Ollman v. Evans, 750 F.2d 970, 977 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985); see also Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302 (8th Cir.), cert. denied, 479 U.S. 883 (1986); Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 783-84 (9th Cir. 1980).

The challenged statements' specificity and verifiability, as well as their literary and public context, are factors used by courts in distinguishing between fact and opinion. E.g., Janklow, 788 F.2d at 1302-03; Ollman, 750 F.2d at 979. The allegedly false implication here arguably was unspecific and unverifiable. The articles, however, contained quotations and opinions both favorable and unfavorable to Diesen, as well as cautionary language, and two of the three articles were printed in the editorial section of the News-Tribune. Under this analysis, then, the challenged speech

was protected opinion. Although not specifically espoused by the Supreme Court in Harte-Hanks Communications, Inc. v. Connaughton, ___ U.S. ___, 109 S. Ct. 2678 (1989), similar factors have been used by the Court in its defamation analysis. E.g., Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264, 284-85 (1974) (a union's "scab" description held protected opinion based on linguistic context and social setting); Greenbelt Cooperative Publishing Ass'n, Inc. v. Bresler, 398 U.S. 6, 14 (1970) ("blackmail" characterization in light of article's full context was deemed merely "rhetorical hyperbole").[1]

In a recent decision, the Eighth Circuit held, "We do not recognize defamation by implication," in affirming summary judgment against a public figure. Price v. Viking Penguin, Inc., 881 F.2d 1426, 1432 (8th Cir. 1989) (citing Janklow, 788 F.2d at 1304), cert. denied, ___ U.S. ___, 110 S. Ct. 757 (1990); accord Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1016-17 (1st Cir.), cert. denied, ___ U.S. ___, 109 S. Ct. 65 (1988). An FBI agent in Price sued a media defendant for allegedly defamatory statements and implications contained in a book, but was not allowed to recover largely because the challenged assertions of improper motive were protected opinion under the Janklow totality of the circumstances analysis. 881 F.2d at 1432. Other jurisdictions have also specifically declined to allow a public official to prove falsity by implication where the challenged statements are true. See, e.g.,

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[1] While proposing an intriguing position, the dissent's opinion that the Supreme Court rejected the fact/opinion dichotomy by not addressing it in Harte-Hanks is premised primarily on speculation and dissenting or concurring opinions. E.g., Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 781 (1986) (Stevens, J., dissenting); Janklow, 788 F.2d at 1306 (Bowman, J., dissenting); Ollman, 750 F.2d at 1036 (Scalia, J., dissenting in part). While distinguishing between fact and opinion may be a difficult task, we feel the fact that the Court denied review in Price v. Viking Penguin, Inc., 881 F.2d 1426, 1432 (8th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 757 (1990) (espousing Janklow analysis), as well as in Janklow and Ollman, and thus passed up opportunities to specifically reject this dichotomy, lends credence to the view that this distinction has not been abandoned.

Cibenko v. Worth Publishers, Inc., 510 F. Supp. 761, 765 (D.N.J. 1981); Pietrafeso v. D.P.I., Inc., 757 P.2d 1113, 1115-16 (Colo. Ct. App. 1988); Strada, 193 Conn. at 326, 477 A.2d at 1012; Schaefer v. Lynch, 406 So. 2d 185, 188 (La. 1981). We concur, believing the subject articles fall within the protected purview as described by the Janklow court:

> [S]peech about government and its officers, about how well or badly they carry out their duties, lies at the very heart of the First Amendment * * *. It is vital to our form of government that press and citizens alike be free to discuss and, if they see fit, impugn the motives of public officials.

788 F.2d at 1304-05 (citations and footnote omitted).

We have held on numerous occasions that truth is a complete defense to defamation and "true statements, however disparaging, are not actionable." Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980) (employer's statements about work record of former employee deemed false and defamatory); see also Lewis v. Equitable Life Assurance Soc'y, 389 N.W.2d 876, 888 (Minn. 1986). In Lewis, we noted that "[e]ven though an untrue defamatory statement has been published, the originator of the statement will not be held liable if the statement is published under circumstances that make it conditionally privileged and if [that] privilege is not abused." Id. at 889. We reiterate that like protected opinion and "fair comment" on public officials, "[t]he doctrine of privileged communication rests upon public policy considerations [and] results from the court's determination that statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory." Id. Thus, while first amendment and other policy considerations underlie this restraint, we note our decision here is rooted in state defamation law.

A trial court must view the evidence in the light most favorable to the jury verdict, Lamb v. Jordan, 333 N.W.2d 852, 855 (Minn. 1983), and should not grant JNOV unless "the evidence

is practically conclusive against the verdict and reasonable minds can reach only one conclusion." Nadeau v. County of Ramsey, 277 N.W.2d 520, 522 (Minn. 1979). Granting JNOV is also proper when the jury's findings are "contrary to the law applicable in the case." Dean v. Weisbrod, 300 Minn. 37, 41-42, 217 N.W.2d 739, 742-43 (1974). A trial court has the power to grant JNOV and to set aside a special verdict when "it appears that the evidence cannot sustain the verdict." 3 D. McFarland & W. Keppel, Minnesota Civil Practice § 2123, at 522-23 (1979) (footnote omitted). When a special verdict is used, as here, the jury is required only to find the facts and "it remains for the court to apply the law to the facts and render a judgment." Id. at 522. In Nadeau, we held the trial court did not err in granting JNOV after the jury in a special verdict found the defendant liable for slander because there was no evidence of "any false and defamatory remarks about plaintiff." 277 N.W.2d at 523. We hold granting JNOV here was proper. Because the printed articles admittedly contained only true statements or opinion, and any implication therefrom was constitutionally protected criticism of a public official, there was no defamatory "speech" as a matter of law.

III.

Once a public official plaintiff establishes the existence of defamatory statements, the official, to prevail, must then also prove the media defendant acted with actual malice in publishing the statements. New York Times, 376 U.S. at 279-80. While we hold an allegedly false implication arising out of true statements is generally not actionable in defamation by a public official, we nevertheless address whether the record establishes actual malice with convincing clarity because the parties argued and briefed the issue, and due to the independent review standard set forth by the United States Supreme Court. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 514 & n.31, reh'g denied, 467 U.S. 1267 (1984); see also Harte-Hanks, ___ U.S. at ___, 109 S. Ct. at 2695 (affirming Bose clear and convincing evidence standard); Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 492 n.21

(Minn. 1985) (adopting Bose standard).

Actual malice for defamation purposes has been interpreted to mean the defendant acted with a reckless disregard for the truth or had a high degree of knowledge of the statements' probable falsity. Herbert v. Lando, 441 U.S. 153, 156-57 (1979). Diesen contends Hessburg acted with actual malice, for example, by fabricating information in establishing a basis to accuse Diesen, badgering interviewees and asking leading questions of them. While Hessburg may have intended to discredit Diesen, "motives of diminishing plaintiff's credibility" do not establish actual malice when there was no evidence the media had actual knowledge of falsity. Fitzgerald v. Minnesota Chiropractic Ass'n, 294 N.W.2d 269, 271 (Minn. 1980); see also Westmoreland v. CBS Inc., 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984) ("a determined effort to confirm a previously formed suspicion * * * does not establish malice"). Further, any ill will Hessburg may have had toward Diesen is irrelevant to the actual malice inquiry. E.g., Harte-Hanks, ___ U.S. at ___, 109 S. Ct. at 2685 n.7 ("actual malice' is unfortunately confusing in that it has nothing to do with bad motive or ill will").

Even if Hessburg used abrasive or antagonistic investigatory techniques, such factors do not establish actual malice. See e.g. id. at ___, 109 S. Ct. at 2684 ("extreme departure from professional standards" insufficient); Reader's Digest Ass'n., Inc. v. Superior Court, 37 Cal. 3d 244, 258, 690 P.2d 610, 619, 208 Cal. Rptr. 137, 146 (1984) (failure to conduct thorough, objective investigation insufficient (citing St. Amant v. Thompson, 390 U.S. 727, 733 (1968))), cert. denied, 478 U.S. 1009 (1986). Further, "[a]n adversarial stance is certainly not indicative of actual malice * * * where, as here, the reporter conducted a detailed investigation and wrote a story that is substantially true." Tavoulareas v. Piro, 817 F.2d 762, 795-96 (D.C. Cir.) (citing Westmoreland, 596 F. Supp. at 1174), cert. denied, 484 U.S. 870 (1987). It is not disputed Hessburg conducted a detailed investigation and the articles' sources testified that statements attributed to them were true.

While Diesen contends the Newspaper acted maliciously by "us[ing] material out of context[,] arrang[ing] facts within the

article[s,] * * * highlight[ing] the negative opinions and downplay[ing] the favorable opinions," arguably, such organization and editing falls within the Newspaper's discretion, as long as the final product was not published with reckless disregard for truth or falsity. See Janklow, 788 F.2d at 1304; Strada, 193 Conn. at 326, 477 A.2d at 1012. There was no evidence the Newspaper doubted the accuracy of the published articles. To the contrary, quotations and documents were rechecked, interviews and notes were reviewed, statements often were presented with cautionary language, and stories that could not be independently verified were not used. Journalism Professor Hollsinger testified no journalism standards were violated in the reporting or editing of the articles. Indeed, he also stated at trial "[t]his is a textbook model of how investigative reporting should be done." The Newspaper editors' refusal to meet with Diesen apparently was in accordance with standard journalism policy. Although Diesen was free to meet with the reporter again at any time and to provide the Newspaper with additional information, he refused to do so. Further, the concern demonstrated by the Newspaper in reviewing the articles with legal counsel before publication contravenes a finding of actual malice. Under such circumstances, "the First Amendment forbids penalizing the press for encouraging its reporters to expose wrongdoing by * * * public figures." Tavoulareas, 817 F.2d at 796 (footnote omitted).

"Although credibility determinations are reviewed under the clearly erroneous standard, * * * the reviewing court must 'examine for [itself] the statements in issue and the circumstances under which they were made to see * * * whether they are of a character which the principles of the First Amendment * * * protect.' " Harte-Hanks, ___ U.S. at ___, 109 S. Ct. at 2696 (citation omitted) (quoting New York Times, 376 U.S. at 285). Further, "[t]he question whether the evidence in the record * * * is sufficient to support a finding of actual malice is a question of law [based] on the unique character of the interest protected by the actual malice standard." Id. at ___, 109 S. Ct. at 2694-95 (citation and footnote omitted). The dissent's discussion of additional facts, which are clearly distinguishable from those in Harte-Hanks, does not change our discernment from the record that actual malice was not estab-

lished here as a matter of law.

IV.

Although the propriety of the punitive damages award was briefed and argued by the parties, ruling as we do, we need not reach that issue.

Reversed.

YETKA, Justice (dissenting).

I would affirm the court of appeals because I believe it was correct in upholding a special jury verdict of the trial court which found that:

1. An article published by the Duluth News Tribune was defamatory to Diesen;

2. The implication of the article was substantially false;

3. Diesen demonstrated by clear and convincing evidence that the article was published with reckless disregard for the truth; and

4. The article was published willfully, maliciously and with intent to harm Diesen.

The article was written by appellant, John Hessburg, who was hired by the Duluth News Tribune in February 1981. Hessburg left the paper in September 1981 after he wrote the article. Hessburg started work on the article in April 1981 after he had met with a group of advocates for battered women, including representatives of the Duluth Women's Coalition, Kathy Berglund, and her attorney. Berglund herself was a battered woman. Diesen claimed that these same people had met with him the previous fall in 1980 and urged him to pursue a felony charge for an assault on Berglund that occurred earlier. Diesen testified that he had denied the request because, in a statement to the Sheriff of Carlton County, Berglund stated that she could not remember the alleged assailant, Melvin DeFoe, hitting her and that she had been drinking heavily prior to the alleged attack.

Following the April 1981 meeting Hessburg had with the women, he attempted to investigate every recent assault in Carlton County, but concentrated on 44 domestic assault cases. He charted

those 44 cases, but did not state in his article that Diesen had been involved in only ten of them. At the outset, Hessburg referred to his investigation as "the Diesen probe."

As the majority opinion points out, Hessburg set up interviews with a number of people: victims of abuse, attorneys, supporters of Diesen and Diesen himself. His interview with Diesen alone took 10-1/2 hours and was taped by Hessburg; however, over 5 hours of the interview on the tape is not a part of the record in this case. Diesen alleges that portions of the interview favorable to him were erased or were taped over by Hessburg. Some of the allegations made by battered women were not contained in the printed article. The newspaper found some of these battered women not to be credible. Witnesses contacted by Hessburg favorable to Diesen found Hessburg's questions misleading and vindictive and called for answers which reflected poorly on Diesen. One of the newspaper's editors who read Hessburg's notes after the latter left the newspaper testified that Hessburg had lost his objectivity. The editors and publishers also testified that they knew that the article implied that Diesen had committed malfeasance and misfeasance in office. Moreover, facts were intentionally omitted from the article, and the juxtaposition of facts within the article itself created false implications. Hessburg's malicious investigative techniques created negative opinions about Diesen and omitted facts which indicated that Diesen was an intelligent, hard-working, conscientious, and impartial county attorney.

The court of appeals, in a scholarly, thoughtful opinion, cited the cases which it thought were applicable at the time the opinion was issued. However, at that time, two important cases, which will be discussed, had not yet been released: one was by the Eighth Circuit Court of Appeals entitled Price v. Viking Penguin, Inc., 881 F.2d 1426 (8th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 757 (1990); the second was by the United States Supreme Court entitled Harte-Hanks Communications, Inc. v. Connaughton, ___ U.S. ___, 109 S. Ct. 2678 (1989). The court of appeals did cite Prosser's treatise on the law of torts to the effect that the gist of a publication protects a defendant who gets the details wrong, but gets the "gist" right; but also works in reverse to impose

liability on a defendant who has the details right, but the "gist" wrong. Diesen v. Hessburg, 437 N.W.2d 705, 709-10 (Minn. App. 1989). The court goes on to indicate that the defendant who juxtaposes a series of facts so as to imply a defamatory connection between them or creates a defamatory implication by omitting facts may be held liable. Id. That is what we have in this case.

I. Falsity

The trial court in the present case granted judgment notwithstanding the verdict based on the "Janklow/Ollman opinion analysis." Under this analysis, an opinion cannot be false because "there is no such thing as a false idea." Price, 881 F.2d at 1431 n.1 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974)). This same test, however, was used by the Minnesota Court of Appeals to reverse the trial court and reinstate the jury's verdict. Diesen, 437 N.W.2d at 711-12. The majority opinion of this court now employs the same test to reverse the court of appeals. These varying results highlight the test's subjectivity and justify closer scrutiny of the Janklow/Ollman test.

The opinion/fact test followed in Price v. Viking Penguin, Inc., 881 F.2d 1426, 1431-32 (8th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 757 (1990),[1] was first articulated in Ollman v. Evans, 750 F.2d 970, 975-79 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985), and was adopted, as modified, by the Eighth Circuit Court of Appeals in Janklow v. Newsweek, Inc., 788 F.2d 1300, 1302 (8th Cir.) cert. denied, 479 U.S. 883 (1986) ("[W]e choose here to adopt the four factors suggested in Judge Starr's scholarly opinion [in Ollman], and to expand them, for reasons we will explain, to include elements of the concurrence by Judge Bork."). This test substantially changes the traditional New York Times Co. v. Sullivan, 376 U.S. 254 (1963), analysis by

[1] This denial of petition for certiorari is ambiguous. It could be interpreted as endorsing the Price court's use of the Janklow/Ollman opinion/fact distinction, or it could mean that the Supreme Court felt that the outcome of the case would be the same (judgment for defendant) under the actual-malice review suggested by Harte-Hanks.

creating an extremely broad opinion privilege for defendants in public official libel actions. The substantial change in the law results from the fact that the applicability of this opinion privilege, unlike the issue of whether there is actual malice, is a question of law and, therefore, answered at the summary judgment stage. By preventing the case from getting to a jury, this test creates a separate constitutional threshold that, in addition to the actual-malice standard, virtually immunizes public official libel defendants.

This additional constitutional hurdle unnecessarily diminishes the protection afforded to the public official's interest in his or her professional reputation by state defamation law. Moreover, because this test is not mentioned in the most recent United States Supreme Court case of Harte-Hanks Communications v. Connaughton, ___ U.S. ___, 109 S. Ct. 2678 (1989), or any other United States Supreme Court decision and not even uniformly accepted by the United States Circuit Courts of Appeals, its validity as first amendment law is suspect. I believe that the Harte-Hanks Court deliberately avoided the troublesome fact/opinion dichotomy and the additional uncertainty it creates in favor of a detailed actual-malice analysis.[2]

In Harte-Hanks, an unsuccessful candidate for the position of municipal judge [Connaughton] brought a federal court diversity libel action against a newspaper. Harte-Hanks, ___ U.S. at ___, 109 S. Ct. at 2681-82. The newspaper published an article which stated that a local woman [Thompson] alleged that Connaughton committed various types of wrongful acts in order to gain her cooperation in exposing corruption on the part of one of the incumbent judge's key employees. See id. at 2692. Following a

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[2] The majority opinion incorrectly suggests that this dissent is based on "speculation and dissenting opinions." Majority op. at n.1. As the following analysis makes abundantly clear, this dissent is premised on the Harte-Hanks majority opinion which, unlike Price, is binding precedent on the constitutional issues presented. In circumventing this binding authority, the majority ignores the elementary rule that a denial of certiorari is not a decision on the merits in an attempt to justify its misplaced reliance on Price.

trial, a jury found, by special verdict, that the publication in question was defamatory, false, and published with actual malice. Id. at __ n.2, 109 S. Ct. at 2682 n.2.

On appeal, the Sixth Circuit Court of Appeals reviewed the evidence supporting each of the jury's special verdicts, including the finding that the article was false, and concluded that these findings were not clearly erroneous. Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825, 841-44 (6th Cir. 1988). With respect to the element of falsity, the court of appeals focused on the falsity of Thompson's "charges" and stated:

> Equally apparent from the jury's answer to the second special interrogatory is that it considered the published Thompson charges to be false. * * * Thus, upon reviewing the record in its entirety, this court concludes that the jury's determinations of the operational facts bearing upon the falsity of the article in issue were not clearly erroneous.

Connaughton, 842 F.2d at 841 (quoted in Harte-Hanks, ___ U.S. at ___, 109 S. Ct. at 2683 n.4).

The court of appeals rejected the newspaper's assertion that the constitutional privilege for expressions of opinion protected the publication of Thompson's "dirty tricks" statement. Connaughton, 842 F.2d at 847. In so doing, the court of appeals stated:

> It [the newspaper] argued that the conclusion that Connaughton was guilty of "dirty tricks" represented Thompson's personal opinions of Connaughton's actions. However, "[o]pinions based on false facts are actionable . . . against a defendant who had knowledge of the falsity or probable falsity of the underlying facts." Davis v. Ross, 754 F.2d 80, 86 (2nd Cir. 1985) (quoting Hochner v. Castillo-Puche, 551 F.2d 910, 913 (2nd Cir.), cert. denied sub nom. A. E. Hotchner v. Doubleday & Co., 434 U.S. 834 (1977); accord Cianci v. New Times Publishing Co., 639 F.2d 54, 65 (2nd Cir. 1980); see

> also Lewis v. Time Inc., 710 F.2d 549, 554 (9th Cir. 1983). Thompson's claim that Connaughton resorted to "dirty tricks" to induce her statements was based upon the false factual assertions that Connaughton had offered Thompson jobs, trips and anonymity. Because the Journal had obvious reasons to doubt the truth of those underlying facts, the references to "dirty tricks" were not constitutionally protected statements of opinion.

Id. at 847 (emphasis added). Based on the foregoing, the court of appeals affirmed the judgment of the district court. Id.

In his dissent, Court of Appeals Judge Guy adopted the newspaper's argument that the references to "dirty tricks" were constitutionally protected expressions of opinion. Connaughton, 842 F.2d 825, 857 (Guy, J., dissenting) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) ("There is no such thing as a false idea.")), and Ollman v. Evans, 750 F.2d 970, 978 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985). Judge Guy reasoned that the language of the article indicated that it was Thompson's opinion and also set forth the basis for Thompson's belief such that "readers were able to decide for themselves as to whether or not the plaintiff's actions constituted 'dirty tricks.'" Despite the obvious similarity between Judge Guy's dissent and the opinion/fact distinction adopted by the Ollman and Janklow courts, the United States Supreme Court did not even discuss the possible existence of constitutional protection for statements of opinion even though it included a one-paragraph summary of the other points made by Judge Guy in his dissent. Harte-Hanks, ___ U.S. at ___, 109 S. Ct. at 2683. Despite this conspicuous omission, the majority of this court chooses to follow the opinion analysis found in Judge Guy's twice rejected dissent.

For purposes of the case at bar, it is particularly significant that the Harte-Hanks Court observed that each of Thompson's

allegations were "accurately reported." Id. at 2692.[3] If the Janklow/Ollman fact/opinion rule somehow insulates newspapers from liability as long as what they print is not verifiably false, the Court surely would have discussed the rule. It could easily be argued that, since the newspaper in Harte-Hanks accurately published what Thompson said, any false implications flowing from those accurate statements were constitutionally protected opinion.

Instead of adopting the Janklow/Ollman opinion analysis in order to immunize media defendants in these types of cases, the Supreme Court focused on the competing individual interest at stake. The Court stated:

> We have not gone so far, however, as to accord the press absolute immunity in its coverage of public figures or elections. If a false and defamatory statement is published with knowledge of falsity or a reckless disregard for the truth, the public figure may prevail.

Harte-Hanks ___ U.S. ___, 109 S. Ct. at 2696 (citing Curtis Publishing Co. v. Butts, 388 U.S. 130, 162 (1967)). Moreover, the court noted:

> Of course, the protection of "calculated falsehoods" does not promote self-determination. As we observed in Garrison v. Louisiana, 379 U.S. 64 (1964):
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> > "At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an ad-

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[3] The majority opinion places great weight on the paragraph-by-paragraph cross-examination of Diesen wherein no specific false statements were identified. This reliance is misplaced because it was the omission of material facts that made the articles substantially false and, therefore, actionable.

> ministration. That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the orderly manner in which economic, social, or political change is to be effected."

Id. at ___ n.34, 109 St. Ct. at 2696 n.34 (citations omitted).

In summary, the United States Supreme Court, unlike the majority of this court, recognized in Harte-Hanks the minimal contribution that false statements make towards the interests protected by the first amendment. Moreover, the Court rejected the hostility to juries embodied in the Janklow/Ollman analysis by leaving the jury's finding of falsity in these case undisturbed. The Court did not, however, indicate in any way that allowing the element of falsity to be found by a jury based on implications flowing from the published statement would impermissibly infringe on first amendment freedoms.

The absence of any meaningful discussion of Ollman or Janklow in Harte-Hanks is perhaps explained by the Court's discussion of the meaning of the terms "actual malice" and "reckless disregard." See Harte-Hanks, ___ U.S. at ___, 109 S. Ct. at 2695. The Court stated: "Uncertainty as to the scope of the constitutional protection can only dissuade protected speech--the more elusive the standard, the less protection it affords." Id.

The above statement supports an inference that the Court was unwilling to add additional complexity to the already complex law of public figure libel by setting forth yet another elusive constitutional standard, namely, the opinion/fact dichotomy, especially in the absence of a showing that the actual-malice standard did not sufficiently protect the competing interests at stake. If nothing else, the 69 pages and 190 footnotes which make up the Ollman decision demonstrate that the fact/opinion dichotomy is an elusive

standard.[4]

Other reasons why the United States Supreme Court did not adopt the Janklow/Ollman opinion analysis may be found by considering the criticism directed at this analysis by the judges who dissented in these cases. In Ollman, Judge Scalia wrote a vigorous dissent attacking the reasoning of Judge Bork's concurrence. See Ollman v. Evans, 750 F.2d 970, 1036-39, (Scalia, J., with whom Wald, J., and Edwards, J., join, dissenting in part). Judge Scalia stated: "[T]o say, as the concurrence does, that hyperbole excuses not merely the exaggeration but the fact sought to be vividly conveyed by the exaggeration is to mistake a freedom to enliven discourse for a freedom to destroy reputation." Ollman, 750 F.2d at 1036 (emphasis in text). Judge Scalia properly observed that "[e]xisting doctrine provides ample protection against the entire list of horribles supposedly confronting the defenseless modern publicist." Id. Judge Scalia further stated:

> It is difficult to see what valid concern remains that has not already been addressed by first amendment doctrine and that therefore requires some constitutional evolving--unless it be, quite plainly, the concern that political publicists, even with full knowledge of the falsity or recklessness of what they say, should be able to destroy private reputations at will.

Id. at 1037 (emphasis added).

Judge Scalia also objected to Judge Bork's unreasonable hostility towards juries in first amendment cases. Judge Bork was alarmed by a "dramatic proliferation" of libel actions. See Ollman, 750 F.2d at 996-97 n.2 (Bork, J., concurring). Judge Bork stated: "The only solution to the problem libel actions pose would appear

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[4] In his concurrence in Ollman, Judge Bork observed that the United States Supreme Court has not adopted a rule employing the opinion/fact dichotomy, noted the sharp scholarly criticism of the rule, and stated that a "significant minority of jurisdictions" reject the opinion/fact dichotomy as "unworkable." Ollman, 750 F.2d at 1001 n.6.

to be close judicial scrutiny to ensure that cases about types of speech and writing essential to a vigorous first amendment do not reach the jury." Id. at 997 (emphasis added). Judge Scalia characterized Judge Bork's approach as "unguided evolution" and noted:

> "The principle that the first amendment does not protect the deliberate impugning of character or reputation, in its application to the preexisting phenomenon of political controversy, is to be revised to permit 'bumping' of some imprecisable degree because we perceive that libel suits are now too common and too successful."

Id. at 1038 n.2.

In a separate dissent, Judge Wald also concluded that the existing law concerning actual malice provided sufficient protection for media defendants. Ollman, 750 F.2d at 1032-35 (Wald, J., with whom Edwards, J., and Scalia, J., join, dissenting in part). Judge Wald accused Judge Bork of attempting to "immunize libel defendants from suit." See id. at 1033. Judge Wald also recognized that Judge Bork's analysis "represents an unprecedented extension into the fact-opinion doctrine of the distinction between public and private officials for the purposes of defamation suits." Id. (emphasis added). Judge Wald correctly observed that:

> In view of the protections already afforded public debate by the "actual malice" standard, I can see no reason other than a vague, but obviously overpowering, distrust of juries for holding the entire law of libel hostage to this quite subtle distinction [between opinion and fact].

Id. at 1035 n.2.

The above criticism of the Ollman analysis is echoed in the dissenting opinion in Janklow. Janklow v. Newsweek, Inc. 788 F.2d 1300, 1307 (8th Cir.) (Bowman, J., joined by Ross, J., and Fagg, J., dissenting), cert. denied, 479 U.S. 883 (1986). In this dissent, Judge Bowman also focused on the countervailing interests at stake in public figure libel actions and said:

> This judicially created limitation on libel actions has, interestingly enough, no apparent relationship to any change that has occurred in either the Constitution or society since the Bill of Rights were ratified in 1791. Libel is still libel. All that has changed is the prevailing judicial perception of where the balance should be struck between libel plaintiffs and libel defendants, who in our time are frequently large media organizations such as Newsweek.
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> Today's decision tips the balance still farther in the media's favor. To the fortress of actual malice, the Court adds a virtually impenetrable outer barrier built upon an extremely broad and elastic definition of opinion. Because opinion is not actionable, see Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974), the result is that many libel cases (and probably almost all libel cases in which the plaintiff is a public official) will be dismissed before the issue of actual malice is ever reached. I find it hard to believe that this is what Justice Powell had in mind when he penned his famous dictum in Gertz that "[u]nder the First Amendment there is no such thing as a false idea." Id. Ideas are one thing, but tawdry attacks on character and reputation are another. I do not see any reason to extend absolute protection under the First Amendment to statements that qualify as opinion rather than fact only by means of judicial semantics based on the Ollman factors.

Janklow, 788 F.2d at 1306-07 (emphasis added) (footnotes omitted). In light of the existence of this persuasive criticism of the opinion/ fact dichotomy, it is not surprising the Harte-Hanks Court refused to adopt the Janklow/Ollman opinion analysis as controlling first amendment law. It is readily apparent from the deference the Harte-Hanks Court gave the jury's findings that the viewpoint expressed by Judge Scalia in his Ollman dissent prevailed.

Because the "We do not recognize defamation by implication" statement in Price v. Viking Penguin, Inc., 881 F.2d 1426, 1432

(8th Cir. 1989), was made in connection with the Janklow/Ollman opinion analysis, it has been rejected by the United States Supreme Court and should, therefore, be rejected by this court.[5] A final point about Price is worth mentioning. After noting that the district court had granted summary judgment for the defendants, the Price court stated: "To reverse this judgment, we must find that Price could show that precise factual statements were false." Price, 881 F.2d at 1434 Philadelphia Newspapers, 475 U.S. at 775 (1985) (citing Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767-775 (1985)) (emphasis added) (footnote omitted).

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1985) (5-4 decision), involved a libel action involving a private figure

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[5] In his concurring/dissenting opinion in this case, Justice Simonett basically adopts the approach offered by Judge Robinson in Ollman. In discussing the fact/opinion dichotomy, Judge Robinson refers to a continuum with statements of pure opinion at one extreme and statements of pure fact at the other. Ollman, 750 F.2d 970, 1021 (Robinson, J., with whom Wright, J., joins, dissenting in part). Judge Robinson says that, along this continuum, are "statements that reflect the author's deductions or evaluations but are 'laden with factual content.'" Id. at 1022 (quoting Cianci v. New Times Publishing Co., 639 F.2d at 63) (emphasis added).

Judge Robinson calls these statements "hybrid statements" and says that they "differ from pure opinion in that most people would regard them as capable of denomination as true or false, depending upon what the background facts are revealed to be." Id.

Judge Robinson recognized that a "defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." Id. at 1027 (citing Restatement (Second) of Torts § 566 (1977)). Judge Robinson concluded that this rule should extend to cover hybrid statements accompanied by an incomplete disclosure of background facts. Id.

My basic disagreement with Justice Simonett is that he too unreasonably minimizes the role of the jury. A jury, after hearing the relevant testimony, observing the demeanor of the witnesses, and making credibility assessments, is infinitely better equipped than an appellate court to make a finding of fact as to the element of falsity. In Lewis v. Equitable Life Assurance Society of the U.S., 389 N.W.2d 876 (Minn. 1986), this court stated: "[T]he truth or falsity of a statement is inherently within the province of the jury. This court will not overturn a jury finding on the issue of falsity unless the finding is manifestly contrary to the evidence." Id. at 889.

who was allegedly defamed concerning a matter of public concern. Id. at 770-75. It is important to note that, in Philadelphia Newspapers, the court discussed the element of falsity from the standpoint of the validity of Pennsylvania common law requirements. Id. A close review of Philadelphia Newspapers indicates that the Price court misinterpreted Philadelphia Newspapers. The cited portion of Philadelphia Newspapers does not say anything that can reasonably be interpreted as requiring "precise factual statements." Instead, the Court stated:

> Our opinions to date have chiefly treated the necessary showings of fault rather than of falsity. Nonetheless, as one might expect given the language of the Court in New York Times [471 U.S.] at 772-73, a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation.

Philadelphia Newspapers, 475 U.S. at 775. Philadelphia Newspapers is silent as to how a plaintiff may prove falsity, that is, whether falsity may be proved by implication.

In a sharp dissent, Justice Stevens focused on the state interest in preventing and redressing injuries to reputation and concluded that the actual-malice standard provided sufficient protection for first amendment interests. See Philadelphia Newspapers, 475 U.S. at 780-90 (Stevens, J., with whom Burger, C. J., White, J., and Rehnquist, J., join, dissenting). In reminding the Court of the competing interest at stake, Justice Stevens repeated the following statement from an earlier Supreme Court decision:

> The right of a [person] to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being--a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by

this Court as a basic of our constitutional system * * *.

Id. at 781 (quoting Rosenblatt v. Baer, 383 U.S. 75, 92-94 (1966) (Stewart, J.)).

The United States Supreme Court decision in Harte-Hanks focuses on the protection afforded by the actual-malice standard and, in so doing, balances the competing interests at stake in a manner much more consistent with the dissent in Philadelphia Newspapers than with the Janklow/Ollman/Price opinion analysis. Accordingly, this court should follow the approach taken in Harte-Hanks. Under this approach, the jury's finding of falsity by implication is consistent with Minnesota's defamation law as set forth in Lewis v. Equitable Life Assurance Society of the U.S., 389 N.W.2d 876 (Minn. 1986), and should not be disturbed by this court.

In Lewis, this court discussed the substantive law of defamation in Minnesota. With respect to the element of falsity, we said:

> True statements, however disparaging, are not actionable. Since it is true that plaintiffs were fired for gross insubordination, the [defendant] company argues, they cannot maintain an action for defamation. The company contends the relevant statement to consider when analyzing the defense of truth is the one that plaintiffs made to their prospective employers, that is, that they had been fired for gross insubordination. Plaintiffs counter that it is the truth or falsity of the underlying statement--that plaintiffs engaged in gross insubordination--that is relevant.
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> * * * *
>
> Requiring that truth as a defense go to the underlying implication of the statement, at least where the statement involves more than a simple allegation, appears to be the better view.

Lewis, 389 N.W.2d at 888-89 (emphasis added). This unambiguous rule recognizing falsity by implication was recently applied by the court of appeals in Karnes v. Milo Beauty and Barber Supply Co., Inc., 441 N.W.2d 565 (Minn. App.), pet. for rev. denied, (Minn., Aug. 15, 1989). In Karnes, the court of appeals cited Lewis for the proposition that truth as a defense must go to the underlying implication and then stated:

> Viewed in the light most favorable to the verdict, these statements go beyond mere allegations and are conclusory; they could be interpreted by a jury as implying that Karnes was either stealing or allowing stealing to take place. In order to employ truth as a defense, [the defendants] would have to show the truth of the allegations, which they did not do.

Id. at 568 (emphasis added). Because a public official libel plaintiff has the burden of proof as to the issue of the truth or falsity of the published statements, it is clear that, as a matter of Minnesota defamation law, the trial court erred in holding that there could be no falsity by implication and granting JNOV. Accordingly, I would affirm the court of appeals' decision.

The majority suggests that its decision is "rooted in state defamation law" by indicating that it is somehow consistent with the discussion in Lewis of the qualified privilege protecting certain communications between employers and employees. See Majority Op. at 11. This is an obvious attempt to shield the majority decision from review by the United States Supreme Court. The majority opinion is unquestionably an extension of the Gertz dictum and, as such, rests solely on a determination of federal law (i.e. a pretended federal defense to a state law claim). The only principled way to reconcile Lewis with the majority decision is to recognize that Lewis is a state defamation case and the majority's decision is an example of the Janklow/Ollman/Price first-amendment analysis.

II. Actual Malice

Actual malice requires that the statements be made with "reckless disregard for the truth." Harte-Hanks, ___ U.S. at ___, 109 S. Ct. at 2685. This standard is a subjective one. Id. at ___, 109 S. Ct. at 2696. The plaintiff may prove the defendant's state of mind through circumstantial evidence. Id. at ___, 109 S. Ct. at 2686. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubt as to the truth of his publication," Harte-Hanks, ___ U.S. at ___, 109 S. Ct. at 2696 (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)), or made the false publication with a "high degree of awareness of probable falsity." Id. (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)). In a case involving the reporting of a third party's allegations, "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Harte-Hanks, ___ U.S. at ___, 109 S. Ct. at 2696 (quoting St. Amant, 390 U.S. at 732) (emphasis added). In St. Amant, the United States Supreme Court also stated:

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call.

St. Amant, 390 U.S. at 732.

"The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." Harte-Hanks, ___ U.S. at ___, 109 S. Ct. at 2694. In discussing the role of a reviewing court, the Harte-Hanks Court said:

> In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witnesses," the reviewing court must "examine for itself the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect."

Harte-Hanks, ___ U.S. at ___, 109 S. Ct. at 2696 (citations omitted).

In applying the above principles, the Harte-Hanks Court analyzed the trial court's jury instructions, the jury's answers to the special interrogatories, and the facts not in dispute and concluded that the jury must have rejected (1) the testimony of the newspaper's witnesses as to why the key informant was not contacted; (2) the testimony of the newspaper's editor as to why he did not listen to the tape containing crucial information; and (3) the testimony of those newspaper employees who testified that they believed that the third party's allegations were substantially true. Id. at 2697. Based on this reasoning, the Harte-Hanks Court concluded that the newspaper acted with actual malice. Id.

The Harte-Hanks Court focused on several key facts: First, that Thompson's [the person quoted in the article] most serious charge was highly improbable and inconsistent with facts known to the newspaper. Harte-Hanks, ___ U.S. at, 109 S. Ct. at 2697-98. The "hesitant, inaudible and sometimes unresponsive and improbable tone of Thompson's answers to various leading questions raise obvious doubts about her veracity." Id. at ___, 109 S. Ct. at 2698 (emphasis added). Finally, the Court noted that no one interviewed the people (the primary informant and the police) most likely to confirm or refute Thompson's charges. Id. at ___, 109 S. Ct. 2693, 2698. The Court then stated:

> Accepting the jury's determination that petitioner's

> explanations for these omissions were not credible, it is likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Thompson's charges. Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category.

Harte-Hanks, ___ U.S. at ___, 109 S. Ct. at 2698 (citation omitted) (emphasis added).

In the present case, Kathy Berglund is in a position somewhat analogous to that of Thompson in Harte-Hanks in that the gravamen of the misfeasance- or malfeasance-in-office charge is based on Diesen's failure to prosecute effectively the man who repeatedly abused Berglund. In the present case, special interrogatory No. 4 stated:

> Did plaintiff prove by clear and convincing evidence that the defendants published the articles with reckless disregard as to the truth or falsity of the implication of said articles?
>
> Answer: "Yes"

Berglund testified at length at trial. Berglund admitted under cross-examination that, following the second battering incident, she told Sheriff Twomey: "After I got out of my car the next thing I remember is coming to on a pile of rocks in my yard." Also during Berglund's cross-examination, the following exchange took place:

> Q And the statement that you gave to Mr. Hessburg about Melvin Defoe tackling you and causing you to fall, that was the first time you told anybody that version of the story correct?
> A I don't know. I didn't talk to anybody else about it between that time, I don't think.

The jury also heard considerable testimony from Diesen regarding the case of Kathy Berglund and the reasons for his actions. Diesen testified that he did not bring felony charges against Defoe because of a number of considerations, including questions concerning Berglund's prior inconsistent statements as to whether Defoe broke her jaw and the way a defense attorney would use these statements. On cross-examination, Diesen testified that, in his opinion, Berglund was intoxicated at the time and fell down while running into the house.

The jury also listened to Police Officer Randelin say that he discussed the Berglund case with Hessburg at great length. Officer Randelin said he became involved in the case because of reports of child neglect and because Kathy Berglund had been drinking and passing out in bars. Officer Randelin also testified about the cycle of violence/reconciliation between Berglund and Defoe and stated: "The Berglunds had been involved in domestics many, many, times; and Kathy never ever, ever followed through."

Officer Randelin also testified about the Chip Martin case referred to in the newspaper articles. Officer Randelin described in detail how he investigated the alleged stabbing incident in that case and how Mrs. Martin ultimately admitted that there had been no knife attack. Officer Randelin also said: "[H]e (Mrs. Martin's attacker) did not stab her; and Hessburg knew that because we talked about that case; and that's not in here [referring to the newspaper article]." The jury also heard Officer Randelin's testimony concerning Hessburg's suggestive interviewing techniques as follows:

> It just seemed like--I just got the opinion, my opinion, that he (Hessburg) was out to nail Don and I didn't know why. Any time I tried to tell him something about, hey, that's not the way it is, he would just come back at me and accuse me of being friends with Dor * * *. But we got into Don's honesty; we got into my feelings about Don; Don's weaknesses, Don's strengths; and we seemed to forget about everybody else in the system, the judges, the probation department, the law

> enforcement officers, social services, the counselors, everybody else that gets involved in domestic abuse cases; and he seemed to just forget all that, and it was all concentrated on Don.

(Emphasis added.) On the witness stand Hessburg flatly denied discussing the Chip Martin case with Officer Randelin ("it wasn't discussed, period."). This denial, however, was promptly and totally impeached by Diesen's counsel through the use of Hessburg's previous deposition testimony which showed that Hessburg had discussed the Chip Martin case with Officer Randelin.[6]

The jury also heard the defendant's expert's statement that this was a "textbook model" of an investigation that the majority finds so authoritative. The jury, however, also observed a withering cross-examination during which the expert admitted that he had not listened to the tapes of Hessburg's interviews and that:

1. An investigative reporter must be cautious when dealing with special interest groups.
2. An investigative reporter should not begin an investigation with a preconceived story because he would be likely to reach a preconceived conclusion.
3. The reporter must remain objective throughout the investigation because, otherwise, the materials in the files would be one sided.
4. In conducting an investigation, it's important to have opinions from "informed sources" on both sides of the issue.
5. A judge, a prosecutor's fellow prosecuting attorney, and law enforcement officials would be "informed sources" on what a prosecuting attorney is doing.
6. He [the expert] was not aware of any judge or fellow

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[6] This portion of Hessburg's testimony, along with the testimony which indicated that portions of Hessburg's taped interviews were missing and other portions had been rearranged, tends to support the jury's implicit conclusions regarding Hessburg's credibility.

prosecuting attorneys of whom Hessburg asked their opinions of Diesen.

7. He did not know if the people whom Hessburg interviewed were "informed sources" or not.
8. From his [the expert's] review of the transcript of the interview, he did not recall Hessburg asking Diesen for the names of people who might be informed sources.
9. If an investigative reporter conducted an unfair investigation, that could result in an unfair article being printed.
10. If an investigative reporter lost his objectivity during the investigation, that could result in a gathering of information that was slanted towards one side.

In addition, the defendant's expert admitted that it would be poor journalism that could result in an inaccurate article:

11. For a reporter to lead sources to the answers he wants;
12. To omit significant facts from an article.
13. To become deeply emotionally involved in a story.

Finally, the defendant's expert admitted that he was aware that the newspaper was concerned that Hessburg had lost his objectivity during this investigation and had become emotionally involved in this story. The expert agreed that if a reporter lost his objectivity, it could poison the whole series of stories. In light of this testimony, the jury's answers to the special interrogatories, and the fact that the jury awarded the plaintiff $780,000 dollars (including $500,000 in punitive damages), the jury must have rejected the defendant's expert's opinion and believed the assertions underlying plaintiff's counsel's leading questions on cross-examination.

The jury also heard testimony that, during his marathon interview[7] with Diesen on August 21, 1981, Hessburg made a thinly veiled accusation that Diesen and/or Twomey destroyed the Greensky file. Hessburg told Diesen that he was going to publish

[7] The interview began on August 21, 1981, at approximately 1:30 p.m. and ended shortly after midnight.

information about the disappearance of the Greensky file and said, "The only logical conclusion any reader will make is that you or Terry [Sheriff Twomey] removed the file and destroyed it. It's a felony to destroy public records."

On August 28, 1981, not long after this marathon interview, Diesen wrote to Mr. Daly, the executive editor of the newspaper, the second of a series of letters expressing concern about the accuracy of the information Hessburg said he was preparing to publish. In this letter, Diesen expressed particular concern about the publication of material which was false and defamatory to him. Daly also received a letter dated August 27, 1981, from Sheriff Twomey indicating that he believed that the newspaper was in the process of a character assassination of Donald Diesen.

The jury heard that, sometime after receiving Diesen's and Sheriff Twomey's letters, Georgia Swing, the newspaper's city editor, was sent to the Carlton County Courthouse to verify the accuracy of Hessburg's reports. Swing could not remember the dates when she went to the courthouse and made no notes of her findings. Swing said that she made two trips to the courthouse and spent a total of about three hours checking files.

Swing said that she could not remember having copies of the unpublished articles with her on her trips, but said that she had the disposition chart which listed the cases Hessburg had looked into. Swing said that she did not check all 44 of the cases. Swing stated that she was interested in the Berglund file because "[t]hat was the focus of one of his [Hessburg's] stories." Nevertheless, Swing said that she never contacted Kathy Berglund, Sheriff Twomey, Sergeant Randelin, or Don Diesen about the Berglund case. Swing said that she could not remember looking at the Chip Martin file. Swing admitted that she did not prepare any kind of written summary of the files for her superiors.

Swing also contacted an attorney who had represented Jennifer Greensky's parents in 1973 in connection with the alleged rape of Jennifer. Swing reported information regarding the Greensky file to Buster, her supervisor. Swing said that she discussed the decision not to publish the Greensky story with Buster. Under cross-examination, Swing said that she was in support of the

decision not to publish the Greensky story in part because "there was a lot of reason to be skeptical of what Jennifer Greensky said * * *." Buster said that he listened to parts of the Greensky tape and began to form doubts about the Greensky matter.

With respect to the tape of the Diesen interview, Buster said, "I listened to parts of it. The whole interview was -- [sic] John ran out of tape. The whole interview was not there; and I did not listen to all the pieces that actually were there." (Emphasis added.) As to why the whole interview was not there, the jury heard Diesen say that the tape contained discussion of cases in a different order than the interview was actually conducted and that a lot of cases discussed during the interview were not on the tapes.

Buster made notes of his review of the tapes. The jury heard Buster's testimony concerning these notes. During this testimony, the jury heard that Buster had noted: "John's question, not only on this tape but on lots of others, lead [sic] the sources to the answers that John wants concerning people's opinions on Diesen." (Emphasis added.) Later, Buster noted that "Hessburg is suggesting to subsequent sources the idea of a special panel to probe the way Diesen handles battering cases, though he didn't suggest it in the first place." Buster also noted that Kathy Berglund indicated that she reconciled with Defoe after the first battering incident and that "Kathy [Berglund] was the one who recommended help for Defoe rather than jail -- recommended to probation officer Mark Zuber." Buster admitted in front of the jury that he specifically noted. "John's comment show [sic] that he's deeply, emotionally involved in the story." Buster told the jury that he noted that Berglund planned to campaign against Diesen in the 1982 election. Buster also noted that he questioned whether Berglund had a "political ax to grind." Despite these observations, Buster never contacted any of the other sources that Hessburg had contacted in developing his story with the exception of a brief discussion with Sheriff Twomey.

Sometime in early October 1981, the newspaper received some additional information from Diesen which indicated that the Greensky story was false. Shortly after this, Fortner and Buster made the decision not to publish the Greensky story.

Sometime around the end of October 1981, Hessburg stopped working for the newspaper. The jury considered ambiguous evidence concerning why Hessburg left the newspaper. Hessburg testified that he tendered his resignation on July 29 or 30, 1981 but that it was effective at the end of September 1981. Hessburg said that he left the Duluth paper because he "wasn't getting along with people the way I thought I should; and it was a matter of, I guess, personal and professional chemistry." Hessburg said that he worked on the article on his own time for roughly 2 weeks after his resignation became effective at the end of September. By contrast, in a letter from the newspaper's attorney, Mr. Killen, to the newspaper's publisher dated October 27, 1981, Killen wrote:

> You have also indicated that the versions which we have reviewed have been sharply edited from the original drafts of the reporter who worked on the story. This reporter is no longer with the newspaper and has been terminated, as I understand it, because you questioned his objectivity.

During his testimony at trial, Killen explained this statement by saying:

> They [the newspaper] certainly left me with the impression that Mr. Hessburg had been terminated. That impression was later corrected by the newspaper to say, in effect, we didn't terminate him, he resigned; but we probably wouldn't have kept him.

Killen's October 27, 1981 letter framed the basic issue for the newspaper as follows: The real question is whether such an apparent attitude on the part of the reporter has poisoned the whole series of stories.

The jury's decision in this case was undoubtedly based on its assessment of credibility. The trial court gave the jury detailed instructions regarding credibility and how to judge the testimony of a witness. The following is a summary of the evidence of

falsity and actual malice contained in the record in this case:

A. Berglund Story

1. Omitted fact of reconciliation after first assault.
2. Omitted fact that Berglund suggested treatment.
3. Omitted fact that Diesen recommended jail.
4. Published the story without verifying details after suspecting that Berglund had a "political ax to grind."
5. Mischaracterized Diesen's reasons for not prosecuting, especially prior inconsistent statements of Berglund and other proof problems.

B. Chip Martin Story

1. Omitted fact that Mrs. Martin admitted that there was no knife attack.
2. Editor failed to check the Chip Martin file when, supposedly, double-checking facts.
3. Hessburg was impeached on the witness stand regarding his denial of the conversation with Officer Randelin regarding Martin's admission.

C. Unpublished Stories

1. Failed to interview Berglund, Martin, or other sources likely to be able to confirm or refute their stories even after learning that the Greensky story was false and forming serious doubts about the truth of several other stories and terminating John Hessburg's employment for reasons related to his loss of objectivity.
2. Published the Berglund and Martin stories after discovering that several of the other stories were doubtful.

D. Verification Efforts

1. Editor who supposedly double-checked accuracy of articles only checked some of the files on a disposi-

tion chart listing 44 cases, of which only 10 involved Diesen. Of the 10 that involve Diesen, the editor could only recall checking the Berglund file.

2. Jury heard testimony regarding tape tampering.
3. Editor who listened to tapes (not the same person who checked files) did not listen to all of the tapes in the newspaper's possession and knew that portions of the interview were missing.
   (a) Noted use of leading questions
   (b) Noted reporter's deep emotional involvement.
   (c) Suspected Berglund's political motives.
   (d) Noted that it seemed "strange" that Ms. Greensky could not remember the details of her alleged rape without coaching from the reporter.
   (e) Failed to interview Berglund, Martin, Diesen, or other informed primary sources even after noting concerns.
4. The newspaper published the articles after being advised by its attorney that there was a question as to whether Hessburg's attitude had poisoned the whole series of articles.

E. Credibility

This case involved lengthy testimony, much of it conflicting, by a number of witnesses. The trial court gave the jury careful and detailed instructions regarding credibility and methods of judging testimony.

The above summary of the record demonstrates that the jury considered evidence sufficient to support a conclusion that the newspaper entertained serious doubts or had obvious reasons to doubt the truth of the reports, especially the Chip Martin and Kathy Berglund stories. Accordingly, the majority's decision reversing the jury's conclusion as to actual malice unreasonably discounts the value of the jury's opportunity to observe the

demeanor of the witnesses, a factor that is significant in determining whether a defendant had a particular subjective state of mind.

It seems to me that the newspaper's conduct in the present case is precisely the type of conduct the United States Supreme Court condemned in Harte-Hanks. Although this dissent is unusually long, I believe that the legal profession, as well as the general public, should understand fully the consequences of today's decision by this court.

Diesen was the subject of a deliberate, cold-blooded, malicious "hatchet job" which had the effect of removing him from public office, destroying his professional reputation, and destroying his ability to earn a living as a lawyer. It must be understood by all that, with this decision, in Minnesota, a newspaper can publish a story with actual malice that (1) intentionally juxtaposes the facts in order to lead a reader to reach a preconceived defamatory conclusion not warranted by those facts and
(2) omits significant facts that would lead to a different conclusion if those facts were not omitted. Yet, says the majority, the newspapers cannot be sued for libel in Minnesota because "there is no such thing as a false idea" and, therefore, we do not recognize falsity by implication.

I doubt that the United States Supreme Court ever intended such a result by its decisions in New York Times v. Sullivan and Gertz v. Robert Welch, Inc. To the contrary, in Harte-Hanks, decided only last year, the court specifically said: "We have not gone so far, however, as to accord the press absolute immunity in its coverage of public figures or elections. If a false and defamatory statement is published with knowledge of falsity or a reckless disregard for the truth, the public official may prevail." Harte-Hanks, ___ U.S. at ___, 109 S. Ct. at 2696 (citing Curtis Publishing Co. v. Butts, 388 U.S. at 162). In Minnesota, however, this is not true any longer. The majority decision virtually closes the door to a public official for any recovery. This is because no editor will set forth all the material facts and expressly charge that a public official is guilty of malfeasance or misfeasance. No, every charge will simply be drafted in the form of an "opinion."

Can it truly be said that this status of the law is better than

the pre-New York Times rule? I think not. What led to the New York Times decision was a fear that newspapers would be subject to increasing numbers of lawsuits unless a stricter standard applied to plaintiffs suing newspapers. Instead the result has been endless confusion in the law and a growth in the number of sensational stories, as well as publications, which pander to the public's insatiable desire for gossip and sensationalism. If a return to the pre-Times status of the law would result in a more responsible press, it might well be worthwhile to overrule it.

Today, purveyors of scandal routinely blend facts with opinion so that, all too frequently, the stories appearing on the front page are themselves thinly veiled editorials. These "journalists" generate substantial profits by trading on the reputations of public figures. They should be required to absorb the occasional jury verdict in favor of a defamation victim as an ordinary cost of engaging in this type of business. As interpreted, the New York Times decision unfairly denies public officials a means of protecting their reputations. Thus, it is true once again that giving one element of society a special privilege denies important rights to others. As to the risk of more lawsuits, that threat can be eased by a more careful pre-publication scrutiny of the facts.

I note that, before the New York Times decision, the press was not unduly restricted from publishing stories that were injurious to the reputations of public officials. Cf. Near v. Minnesota, 283 U.S. 697, 719-23 (1931) (5-4 decision) (prohibiting prior restraints). The media was able to divulge that a President of the United States had a child out of wedlock, disclose the Teapot Dome scandal of the 1920's, the Vicuna Coat stories of the 1950's and countless other scandals. Effective libel law has long been the primary check on the power of the press. In Near, the Court stated: "Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals." Id at 718-19 (emphasis added).

The majority's decision today relieves the press from

subsequent punishment and, in so doing, unnecessarily upsets the delicate but necessary balance between the freedom of the press and the liberty of individuals. Perhaps it is time for the United States Supreme Court to take note of the consequences of the New York Times rule and how lower courts are applying that rule.

I thus dissent most vigorously from the majority's interpretation of the law in New York Times v. Sullivan, Gertz v. Robert Welch, Inc., and Harte-Hanks Communications v. Connaughton and the decision made as a result of those interpretations. I believe that the decision is wrong in its interpretation of first amendment law, wrong in its interpretation of state defamation law, wrong in invading the province of the jury, and wrong as a matter of public policy. For all of those reasons, I would affirm the court of appeals.

KELLEY, Justice (dissenting).

I join the dissent of Justice Yetka.

SIMONETT, Justice (concurring specially).

I concur with Part II of the majority opinion. Because I do not reach the actual malice issue, I do not join in Part III. Plaintiff's theory of the case was "that the series of articles are the [defamatory] statement." In a sense this is correct, but it still leaves a need to articulate the implication in the newspaper stories that is claimed to be defamatory and false.

The three articles are long, much too long to repeat here. But some description of the articles is necessary if the issues are to be discussed intelligently, even though to summarize is to engage, I suppose, in one's own statement by implication.

I.

The first article, on the front page, is entitled Is justice denied battered women in Carlton County? The article states that men who batter women seldom face felony charges and seldom go to jail, and that felonies are generally plea-bargained to misdemeanors. "These generalizations," says the article, "have been verified

by an investigation of Carlton County records * * *." Local judges, attorneys, and law enforcement officers are quoted on the problems involved in family assault matters. Several battered women cases are then discussed, namely, the Carlton County cases of Henry Wallin, Kenneth K. Clark, Chip Martin, and Donald Defoe. In each case either felony charges were reduced to misdemeanors or only misdemeanor charges were filed, and the defendant served no jail time. One of the charges against Defoe was still pending at the time of the article. Diesen is quoted at some length, explaining the "family dynamics" that require his office to proceed cautiously in family assault matters.

The second article, on page 1D, is headlined Justice denied? The case of Kathy Berglund. The article describes two violent physical attacks on Berglund by Melvin Defoe, 9 months apart. Without consulting with Berglund or her personal attorney, Diesen dismissed the felony charges against Defoe for the first assault and accepted a misdemeanor plea with a stayed jail sentence. Defoe was charged with two misdemeanors for the second attack, which charges were still pending. Berglund's personal attorney was quoted as saying Diesen was "not pushing." Diesen chose not to comment on the second attack charges because they were still pending, even though a year had gone by. As to the first attack, Diesen explained his reasons why the felony charges were dropped (devastating effect of a trial on participants -- unavailability of witnesses -- and in the final analysis, "a judgment call").

Finally, the third article, entitled County Attorney Donald Diesen -- Critics say he's not tough on domestic abuse, appeared on the focus/editorial page. The second and third paragraphs state:

> Critics charge Diesen has ineptly handled battered women's cases through callous treatment of victims, half-hearted prosecution of their complaints, a tendency to demand too much evidence and undue willingness to plea bargain felony assaults down to misdemeanors.
>
> On the other hand, Diesen is seen by supporters -- and even some hard-line opponents -- as scrupulously honest, a soft-spoken gentleman, a man who works hard

and is not controlled by any special interest. * * * *

This article consists primarily of quotations from one attorney and two law enforcement officers, which are favorable to Diesen, and quotations from some five attorneys and two battered women advocates which are unfavorable.

II.

I believe articulation of the defamatory implication is a question of law for the court to decide. Utecht v. Shopko Dept. Store, 324 N.W.2d 652, 653 (Minn. 1982). It seems to me, as it did to the trial judge, that the implication of the articles is "one of vague derogation of plaintiff in his official capacity." The implication is that Diesen was less than vigorous in prosecuting domestic violence cases; that he was not doing the job he should have been doing and should be removed from office; that, in short, Diesen was a poor prosecutor.[1]

If a statement is defamatory (as here), the next step is whether it is false. In my view, the statement "Diesen is a poor prosecutor" is what Judge Robinson calls a "hybrid statement," i.e., a statement expressing an opinion which relies on underlying facts. Ollman v. Evans, 750 F.2d 970, 1023 (1984) (Robinson, J., dissenting). Indeed, it is difficult to imagine a more fact-laden

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[1] One of the difficulties with defamation by implication is the difficulty in stating what is being implied, as the implication varies with the implicator. One can say the articles imply Diesen is an inept prosecutor, or an unfit one, or a capable prosecutor who only lacks a necessary forcefulness in prosecuting certain types of cases. Plaintiff Diesen contends the implication is that he is guilty of misfeasance or malfeasance in office, but this, it seems to me, is indulging in rhetorical hyperbole. The articles do not support an implication that Diesen intentionally failed or refused to perform a known mandatory, nondiscriminatory, ministerial duty of his office. See Minn. Stat. § 609.43 (1988) (misconduct of public officers). The articles only suggest that Diesen should have used his prosecutorial discretion more forcefully in battered women cases.

The formulation "Diesen was a poor prosecutor" or "Diesen lacked prosecutorial fitness" seems to me to encompass pretty well the various permissible derogatory connotations, and, therefore, these are the formulations I will use.

hybrid than a derogatory conclusion wholly implied from published facts.[2] Diesen may therefore prove, if he can, the falsity of the defamatory implication of prosecutorial unfitness. He may do so by proving that the underlying facts, as reported in the newspaper, were either: (a) untrue (as was done in Harte-Hanks);[3] or (b) that some underlying facts were omitted from the published articles, which, if they had been reported, would have refuted the implication of prosecutorial unfitness. Here the published facts are true. Plaintiff's only hope was to prove falsity by omission of critical predicate facts. I agree with the trial judge that plaintiff failed in such proof as a matter of law.

Justice Yetka's dissent sets out certain underlying facts that should have been in the articles but were not. Even so, these facts omitted from the articles do not make the true facts that were published untrue. Because Kathy Berglund may at one time have been ambivalent about her assaulter going to jail does not necessarily mean, in view of the other facts which are also true, that the

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[2] The third article, entitled Critics say he's not tough on domestic abuse, is based on interviews with persons familiar with Diesen's handling of battered women cases. The article quotes generously what these persons had to say about Diesen's exercise of his prosecutorial powers, which, with a few exceptions, was uncomplimentary.

It was shown at trial that all persons quoted were quoted accurately. The newspaper does not claim it is immune from liability because it was only accurately reporting the views of others. Rather, the newspaper accepts responsibility for its use of these quotations to convey whatever derogatory statement is implicit in the three articles taken together.

[3] In Harte-Hanks Communications, Inc. v. Connaughton, ___ U.S. ___, 109 S. Ct. 2678 (1989), the defendant newspaper stated explicitly that plaintiff, a candidate for judicial office, had engaged in "dirty tricks." In support of this accusation the newspaper reported statements by a witness who claimed that plaintiff had promised the witness and her sister jobs and a vacation trip if the sister would testify to bribery activity in the incumbent judge's office. In fact, as the jury found, the plaintiff had made no such promises and the published report of such promises was, therefore, false. Because the "dirty tricks" statement was specifically tied to the (falsely) reported promises, the statement as to dirty tricks was also, necessarily, false.

prosecution should not have sought a jail sentence. Nor do the omitted facts in the Berglund case detract from the facts of the Wallin, Clark, Martin, and Donald Defoe cases indicating overly lenient prosecutions in those instances. If all the underlying facts are taken into account, both published and unpublished, it might be argued that the articles as published lacked balance; but it cannot be said the implication in the articles that Diesen was a poor prosecutor was false. Consequently, I would hold the jury's finding that the defamatory implication of the articles was substantially false is manifestly contrary to the evidence and, as the trial judge ruled, must be set aside.

If the defamatory implication was "Diesen is guilty of malfeasance or misfeasance in office," as Diesen argues, then I think a jury could find that this defamation was false and Diesen could recover if he could also prove actual malice. I do not, however, for reasons already stated, see footnote 1, believe the three articles support the implication of that defamatory statement.

In deciding whether the defamatory statement "Diesen is a poor prosecutor" is a false statement, I do not subscribe to the Janklow/Ollman test as to what is fact and what is opinion. It seems to me this test goes too far in extending the mantle of protected speech over statements that are a hybrid of fact and opinion.

Plaintiff's cause of action fails here because the statement "Diesen is a poor prosecutor" is not false. By this I mean no more than that when all the underlying predicate facts are considered, with all their conflicting inferences, the statement is not provable one way or the other. One might say this is the same thing as saying that the statement is only an opinion and, in the words of Gertz, "there is no such thing as a false idea"; in other words, the statement is analyzed in terms of whether it is an opinion to determine its falsity. I think it is more accurate to say that what we have here is a hybrid statement where the factual content as evidenced by the underlying facts cannot, as a matter of law, support a finding of falsity.

III.

I decline to join Part III of the majority opinion. My concern is not with reporter Hessburg's less than admirable conduct, but with the editors' actions. Diesen submitted to an 11 1/2-hour interview with reporter Hessburg, for which Hessburg could account for only 5 1/2 hours of tape. Diesen, believing (with some cause) that the reporter was building an unfair case against him, asked to meet with someone from the paper other than Hessburg. What is unusual about this case is that the editors were aware Hessburg had developed a dislike for Diesen and that Hessburg's personal feelings had impaired his journalistic judgment. Yet, rather than have another reporter meet with Diesen, the editors elected only to edit and recheck the facts insofar as reported to them by Hessburg, without knowing whether or not there were other facts or circumstances that Diesen might supply which would tell a different story.

As it so happened, lucky for the newspaper, there were no other facts omitted from the newspaper articles that would have required any change in the tenor of the articles. If there had been, I think the newspaper's turning a deaf ear to Diesen might, arguably, have supported a jury finding of actual malice. See Harte-Hanks, supra (newspaper's failure to investigate was a purposeful evasion of the truth). Because Diesen was a public official, he had to prove actual malice as part of his cause of action. In my view, the defamatory implication not having been proven to be false, like the trial judge, I do not reach the issue of actual malice.

COYNE, Justice (concurring specially).

Although I do not consider defamation -- whether by implication, innuendo, or direct falsehood -- to be entitled to immunity simply because the target is a public official, I concur in the result reached by the majority because I do not find reckless disregard for the truth amounting to actual malice in the constitutional sense.

STATE OF MINNESOTA

IN COURT OF APPEALS

C2-88-1345

St. Louis County — Norton, Judge

Donald J. Diesen,

Appellant,

Patrick T. Tierney
Collins, Buckley, Sauntry
& Haugh
W-1100 First Nat'l Bank Bldg.
St. Paul, MN 55101

vs.

John Hessburg, et al.,

Respondents.

Thomas R. Thibodeau
Joseph J. Roby, Jr.
Johnson, Killen, Thibodeau
& Sieler, P.A.
811 Norwest Center
Duluth, MN 55802

Filed March 28, 1989
Office of Appellate Courts

SYLLABUS

1. There may be libel by implication where underlying statements are true or are opinions, when known facts are omitted which would have changed the implication of the article, if a party proves that the printed implication was false and defamatory and it is shown by clear and convincing evidence that the article was published with reckless disregard as to its falsity.

2. Where an article is written and printed in a manner that the audience could reasonably infer that it was meant to be a factual news article, the article as a whole is not protected as

opinion of the reporter or the newspaper.

Reversed.

Heard, considered and decided by Short, Presiding Judge, Nierengarten, Judge, and Norton, Judge.

OPINION

NORTON, Judge

This is an appeal from a judgment notwithstanding the verdict (JNOV) granted to respondents John Hessburg and the Duluth News-Tribune in a libel action. The jury had found by special verdict that an article published by respondents was defamatory to appellant Donald Diesen, that the implication of the article was substantially false, that Diesen demonstrated by clear and convincing evidence that respondent published the article with reckless disregard as to the truth of the implication of the article, and that Diesen had proved by clear and convincing evidence that the article was published wilfully, maliciously and with the intent to injure Diesen. The jury awarded Diesen $280,000 in compensatory damages and $500,000 in punitive damages.

The trial court granted the JNOV stating that there can be no action for libel based on false implications arising from a series of true facts and opinions, and alternatively that any implication of the article was protected because it was the mere opinion of the author, the publisher or the article's sources. We reverse.

FACTS

Appellant Donald Diesen was 54 years old at the time the subject article, consisting of three stories (Is justice denied battered women in Carlton County?, County Attorney Donald Diesen Critics say he's not tough on domestic abuse, Justice Denied? The case of Kathy Berglund), was printed on November 15, 1981 in the Duluth News-Tribune (article). Diesen graduated from the University of Minnesota Law School in 1956 and first became involved in the Carlton County Attorney's office in the summer of 1969. Diesen was appointed Carlton County Attorney in 1970 and

thereafter won elections in 1970, 1974 and 1978. He did not run for re-election in 1982, as a result of the subject article.

Respondent John Hessburg was hired as a reporter for respondent Duluth News-Tribune in February 1981. Hessburg voluntarily quit September 30, 1981, after he completed writing the subject article.

Hessburg started working on the article in the spring of 1981. Hessburg began his investigation as a result of a complaint which had been called into the paper about the lack of prosecution of domestic abuse cases in Carlton County. In April 1981, Hessburg met with a group of advocates of the battered women, including Kathy Moore and LuAnn Dietrich of the Duluth's Women's Shelter, and Dale Lucas, attorney for Kathy Berglund, a battered woman. Berglund and Jennifer Greensky, also a battered woman, were also present at this meeting. The advocates and victims brought to Hessburg's attention their claims that there were problems with Carlton County's prosecution of domestic abuse cases.

According to Diesen, the same advocates had met with Diesen in September 1980 in order to pressure Diesen to issue felony charges for an assault that occurred to Kathy Berglund on September 1, 1980. Diesen refused to press felony charges in this matter because Berglund had given a statement to Sheriff Twomey of Carlton County, stating that she could not remember the assailant Melvin Defoe beating her, and that she had had six drinks immediately prior to the attack.

In his investigation, Hessburg spoke first with the battered women's advocates and some of the women who had made allegations. After interviewing these people, Hessburg examined every initial complaint report (ICR) on every assault in Carlton County. Eventually, Hessburg reduced the several thousand ICR's to 44 which involved domestic assault. Hessburg developed flow charts which indicated the dispositions of these 44 cases. Hessburg ascertained who had dealt with the women involved in the assaults on their way through the judicial system. However, the article did not state that Diesen had contact with only ten of these cases.

From the outset of his investigation, Hessburg's notes refer to

this as "the Diesen probe." In April 1981, Hessburg told Berglund that the story he was writing was on "possible abuses of power by a certain county attorney." In reading Hessburg's notes shortly after he left the paper, Dennis Buster, an editor for the Duluth paper, found that Hessburg had lost his objectivity. After the initial interviews where the people had expressed unfavorable opinions about Donald Diesen, Hessburg set up interviews with Diesen and his supporters.

Hessburg's interview with Diesen lasted 11-1/2 hours. This interview was taped by Hessburg, however, approximately five hours of this interview are not on tape. Diesen alleges that portions of the interview favorable to Diesen were erased or taped over by Hessburg.

Not all of the allegations by the battered women were contained in the article. Specifically, the allegations by Jennifer Greensky were found not to be credible by the editors and Hessburg and, therefore not used in the article. However, a statement made by Greensky was repeated often by Hessburg while interviewing advocates and other battered women while questioning them about Diesen. Greensky had claimed that she had been raped in the early 1970's while only 15 years old, in a car on a deserted road in winter. When Greensky went to Diesen, Diesen allegedly asked her whether this was the first time she had ever spread her legs. Diesen adamantly denied ever saying this, and the editors of the paper also found that this was not true. However, Hessburg never relayed this to people to whom he had reported the statement.

While Hessburg interviewed numerous people who had unfavorable views about Diesen, Hessburg never asked Diesen for any sources who might give an opposing view. Sheriff Twomey and Patrol Officer Randelin were favorable to Diesen and said so to Hessburg. However, both of these people thought Hessburg's questions were misleading, vindictive and begged an answer which Hessburg wanted, which would be unfavorable to Diesen. Editor Buster's notes also indicate that Hessburg was suggesting to subsequent sources the idea of a special panel to probe the way Diesen handled battering cases.

All of Hessburg's material was reviewed by his editors. The editors testified that they independently confirmed Hessburg's information prior to publishing the article. Georgia Swing, city editor, went to the county courthouse to verify the disposition of the files and the information used by Hessburg. On a second visit, Swing was accompanied by Dennis Buster, also a city editor. Buster also spent several hours listening to the tapes Hessburg had made of interviews with witnesses. Afterwards, Buster reported to Larry Fortner, managing editor, that there were no inaccuracies that he was able to find between what was on the tape and what had been written by Hessburg. Fortner testified that the article contained only information that was available through public records or which was attributed to some named source. Thomas Daly, executive editor of the paper in 1981, and John McMillion, publisher of the newspaper in 1981, both testified that they knew of nothing false in the article. However, the editors and the publishers testified that they knew that the implication of the article was that Diesen had committed malfeasance or misfeasance in office in failing to prosecute domestic assaults.

While the underlying facts in the story were true, and the defamatory references to Diesen were opinions of the advocates and battered women, Diesen claims that the whole implication of the article was libelous because facts were intentionally omitted from the article, the juxtaposition of facts within the article created a false implication, and Hessburg's malicious investigative techniques created negative opinions about Diesen.

Significant facts which were not included in the article relate to the assault on Kathy Berglund and its disposition. The article correctly states that Diesen plea bargained the felony assault charge to a misdemeanor. However, the article failed to mention that Kathy Berglund had told the assailant's probation officer that she believed chemical dependency treatment was more appropriate for Melvin Defoe, the assailant. The article also neglected to mention that Diesen had requested jail time for Defoe. The article also failed to mention that Berglund admitted that she was unwilling to go through any court process at that point in time. Buster admitted that he was aware of these omissions prior to publishing the article.

By the omission of these facts, the reader is left with the view that even though Berglund was severely assaulted by this man, Diesen did not believe it merited felony prosecution due to several reasons stated as opinions in the article, namely, that he was more concerned with his win-loss record and his own personal view that the criminal forum is not the proper place for domestic disputes.

ISSUES

I. Did the trial court err in granting JNOV, and in holding there could be no defamation by implication in this case?

II. Did the trial court err in holding that the article is protected as being an opinion of the reporter or of the newspaper?

ANALYSIS

I.

When a public official is involved, as in this case, constitutional guarantees of the first amendment preclude recovery by a public official for defamation unless the official can prove with "convincing clarity" that the statement at issue was made with "actual malice." New York Times v. Sullivan, 376 U.S. 254, 285-86, 279-80 (1964). Actual malice has been defined as "knowledge that [such statement] was false or * * * reckless disregard of whether it was false or not." Id at 280. The question of actual malice is not whether the statement was made with ill will, although a showing of ill will may be relevant to show a state of mind which may be subject to reckless disregard of the truth. See Cochran v. Indianapolis Newspapers, Inc., 372 N.E.2d 1211, 1220 (Indiana App., 1978).

In general, the granting of a judgment notwithstanding the verdict is a pure question of law. Edgewater Motels, Inc. v. Gatzke, 277 N.W.2d 11, 14 (Minn. 1979). The question of law before the trial court and this court is whether, viewing the evidence in the light most favorable to appellant, there is a reasonable basis for the verdict. Id.

However, when determining actual malice in a defamation action subject to the standards of New York Times v. Sullivan, 376 U.S. 254 (1964), the appellate court "must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." Bose Corp. v. Consumers Union, 466 U.S. 485, 514 (1984). Bose does not specifically state what amount of deference a reviewing court is to give to the trier of facts' opportunity to judge the witnesses' credibility, whether that be a trial court or a jury. See Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119, 1128 (7th Cir. 1987), cert. denied, ____ U.S. ____, 108 S.Ct. 1302 (1988). Under one view, Bose's mandate of de novo review means with no deference at all to be accorded any jury finding germane to actual malice. Under the contrary view, Bose does not alter the traditional rules governing the review of jury verdicts and thus judicial deference is constitutionally mandated to presume jury verdict findings of underlying facts, evaluations of credibility, and the drawing of inferences. See Tavoulareas v. Piro, 817 F.2d 762, 776-77 (D.C. Cir. 1987).

In Brown & Williamson, the appellate court gave little or no deference to the jury's findings; however, the court admitted that it was incapable of making credibility determinations, and found that whatever the standard of review in Bose, when the record fully supports a jury's verdict, the court is required to affirm the jury verdict. See Brown & Williamson, 827 F.2d at 1129. We agree with the Seventh Circuit that where the record fully supports the jury's verdict, as in this case, the court is required to affirm the verdict.

Diesen contends 1) that a libel action may lie where a series of true facts and mere opinions leads to a false implication; 2) that the false implication of the article was clearly understood by the jury; and 3) that there was competent evidence supporting the jury's findings that the implication of the article published by respondents was substantially false. The trial court found that there can be no libel action where a false implication is the result of a series of true statements and opinions, and further found that the implication was too vague to constitute a defamation action.

Whether a defamatory implication can be found is first a legal

question for the court to decide, before determining whether it should be sent to the jury. Memphis Publishing Co. v. Nichols, 569 S.W.2d 412, 419 (Tenn. 1978). The Minnesota Supreme Court has recognized that true statements can convey a false impression. Lewis v. Equitable Life Assurance Society, 389 N.W.2d 876, 889 (Minn. 1986). The burden of proof in proving a falsity in a statement or implication is on the plaintiff. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776, (1986).

Diesen relies on Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978), in his argument that there can be a false implication based on true individual statements of facts or opinions. In Nichols, a private citizen was allegedly defamed by the implication that she was having an adulterous affair with a neighbor's husband. If all the facts had been printed by the paper, this defamatory and false implication would not have been created. The court in Nichols stated that the defendant's reliance on the truth of the facts was misplaced because the question was "whether libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced." Id. at 420 (quoting Fleckenstein v. Friedman, 266 N.Y. 19, 23, 193 N.E. 537, 538 (1937)). The publication of the complete facts could have conceivably led the reader to conclude that there was no adulterous relationship.

> The published statement, therefore, so distorted the truth as to make the entire article false and defamatory. It is no defense whatever that individual statements within the article were literally true. Truth is available as an absolute defense only when the defamatory meaning conveyed by the words is true.

Id.

We agree with the holding in Nichols. There may be defamation by implication, where known facts are omitted, which could have changed the defamatory implication of the article. It is clear

that this is a half-truth, which amounts to merely a lie. Defamation by implication is further discussed in Prosser, The Law of Torts § 116, 5th Ed. (Supp. 1988), which states:

> The rule that makes truth relevant to the "gist" or "sting" of the publication protects the defendant who has got the details wrong but the "gist" right; but it also works in reverse, to impose liability upon the defendant who has the details right but the "gist" wrong. Thus, if the defendant juxtaposes the series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts, he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct.

(Emphasis added).

The trial court and respondents rely on Strada v. Connecticut Newspapers, Inc., 193 Conn. 313, 477 A.2d 1005 (1984), in arguing that there can be no libel by innuendo, if the challenged communication is true and concerns public officials and public affairs, even though a false implication may reasonably be drawn by the public. However, upon closer examination of the actual holding in Strada, we believe Strada does not stand for this proposition. Strada states:

> * * * in the instant case, the plaintiff seeks to recover from a publication where all the underlying and stated facts have been proved to be true, or substantially true, claiming that the "slant" of the article gives rise to allegedly false and defamatory implications. Unlike Memphis Publishing Co. v. Nichols, supra, the plaintiff here has not alleged nor has our examination of the record disclosed, the existence of additional material facts which, if reported, would have changed the tone of the article. In the absence of such undis-

> closed facts, first amendment considerations dictate that an article concerning a public figure composed of true or substantially true statements is not defamatory regardless of the tone or innuendo evident.

Id., at 323, 477 A.2d at 1010 (emphasis added).

In the present case, there was evidence produced at trial to show that the reporter and his editors were aware that substantial facts were omitted regarding the Kathy Berglund story, which would have changed the tone of the article. Therefore, this case is distinguishable from Strada, and there may be defamation by implication.

We believe the numerous cases cited by respondents can be distinguished. In each of these cases, one of the necessary factors for libel was not met, in denying a claim for defamation by implication of a public official. Garrison v. State of Louisiana, 379 U.S. 64 (1964) (no defamation by general allegations of incompetency of a public official, because protected by the first amendment); Hirman v. Rogers, 257 N.W.2d 563 (Minn. 1977), and Valento v. Ulrich, 402 N.W. 2d 809 (Minn. Ct. App. 1987) (malice cannot be presumed or inferred, but must be actually proven by a public official); Schaefer v. Lynch, 406 So.2d 185 (La. 1981) (no defamation because article was factually correct even though written with actual ill will and malice by the reporter); See Hein v. Lacy, 228 Kan. 249, 616 P.2d 277 (1980) (state senator not defamed when campaign brochure said he voted to decriminalize pot and legalize homosexuality, because both statements were true or substantially true and no additional facts were omitted); Rinaldi v. Holt, Reinhart & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 1299 (1977) (allegedly defamed judge could not prove statement that he was "probably corrupt" was false or said with actual malice; and mere derogation of a public official is not actionable).

In the present case, the trial court held that even though the jury found a defamatory implication which was substantially false, this implication was too vague to be actionable. Appellant in his

opening statement and in his closing argument, and through testimony of the reporter, the editors, and the publisher argued to the jury that the specific implication of the article was that Diesen committed misfeasance or malfeasance in office. It is clear that appellant adequately argued, and there is competent evidence to support the jury's finding, that there was a defamatory implication which was substantially false. An implication of misfeasance or malfeasance is more than a vague derogation of a public official, and more than a general allegation of incompetency of a public official.

We believe there is sufficient evidence to find that the article conveyed a defamatory implication which was substantially false, which could have been changed if known facts were included. Additionally, Diesen proved by clear and convincing evidence that respondents published the article with reckless disregard as to the truth or falsity of the implication of the article; and that the article was published wilfully, maliciously and with the intent to injure Diesen. Under these circumstances, the jury could properly find defamation of Diesen by respondents. Accordingly, we reverse the trial court on this issue.

II.

Respondents argue that even if the implication of the article suggests misfeasance or malfeasance by Diesen in office, it is constitutionally protected because it is the opinion of the sources, the reporter, or the newspaper as a whole. The trial court found that the article was opinion and therefore protected. Whether a statement is one of opinion and absolutely protected by the first amendment is a question of law for the trial court and for this court. See Janklow v. Newsweek, Inc., 788 F.2d 1300, 1305, n.7 (8th Cir. 1986), cert. denied 479 U.S. 883 (1986); Erven v. Provost, 413 N.W.2d 861 (Minn. Ct. App. 1987), pet. for rev. denied (Minn. Nov. 24, 1987).

This court has adopted the four factors to be used in distinguishing statements of fact from statements of opinion as set forth in Janklow. Capan v. Daugherty, 402 N.W. 2d 561, 563 (Minn. Ct. App. 1987). These four factors must be considered as a whole.

Id. at 564. The four factors are:

> 1. the precision and specificity of the disputed statement (the more imprecise, the more likely opinion);
> 2. the statements' verifiability (the less verifiable, the more likely opinion);
> 3. the literary and social context in which the statement was made (including the entire communication's tone, the use of cautionary language, the category of publication, its style of writing and intended audience); and
> 4. the statement's public context (consideration of the public or political arena in which the statement was made).

Janklow, 788 F.2d at 1302-03.

Respondents argue that the first factor, precision and specificity of the statement, is totally lacking. Respondents argue that there is merely a nebulous innuendo which some people might find. However, respondents have been able to find a precise implication and stated before publication that the implication was one of malfeasance or misfeasance by Diesen in office. Additionally, there are specific examples as to Diesen's inadequacy. The article specifically stated that Diesen was overly concerned about his win-loss record, and did not want to go to trial because of his hearing impairment, or because of his personal view regarding domestic relations.

The second factor under Janklow is verifiability. Diesen's motives for prosecuting or not prosecuting cases are unverifiable. However, disposition of the cases and the police reports which include facts, are clearly verifiable.

The next factor under Janklow which we need to analyze is the public context in which the statement was made. In the present case, Diesen was an elected official and participated in public debate and could expect to be the focus of criticism or controversy in his position. This is similar to the tobacco company in Brown & Williamson Tobacco Co. v. Jacobson, 827 F.2d 1119 (7th Cir.

1987), cert. denied, ___ U.S. ___, 108 S.Ct. 1302 (1988), where the merits of smoking and the advertising technique of the tobacco companies were open to regular public debate. Id. at 1122. It is conceded that critique of a public official's job performance is deemed to be a matter of public opinion for purposes of defamation. Gertz v. Robert Welch, Inc., 418 U.S. 323, 337-38 (1974).

The final factor is the literary and social context of the article. The quotations are attributed to named sources in the article which respondents say shows cautionary language. However, this is not the most important point of the final factor. The crucial factor in the analysis is that respondents, themselves, believed they were doing an investigative report and that the readers would take the article as such, and draw their own inferences from it. Even though portions of the article were printed in the focus/editorial section of the paper, respondents, specifically Hessburg, testified that the article was not his opinion, but was a factual report.

The present case is similar to Brown & Williamson, where a television reporter had a nightly feature known as "Perspective." Brown & Williamson, 822 F.2d at 1129. In giving his perspective, the reporter, Jacobson, moved to a different part of the newsroom. However, he was touted as the city's most savvy political reporter. The gist of Jacobson's perspective was that the plaintiff tobacco company was going after children to get them hooked on cigarettes. Jacobson relied on an FCC report regarding plaintiff's proposed advertising scheme. However, it was conceded that plaintiff never used this advertising scheme and the FCC report acknowledged that. The news broadcast did not report that the advertising scheme was never used by the plaintiff tobacco company.

In Brown & Williamson, the court held that this was not an editorial opinion protected by the first amendment, but that it was a factual report. Merely by sitting in a desk under a sign labeled "perspective" did not make the report an opinion. See id. at 1130. In Brown & Williamson, as in the instant case, plaintiff claimed that defendants intentionally and maliciously omitted significant facts from the report and distorted other facts. In Brown & Williamson, the court upheld the jury's verdict in finding defamation,

and held that the perspective report was to be taken as a statement of fact and not protected as opinion. Id. at 1131.

At trial in the present case, respondents argued that the article was an accurate news story. Additionally, the reporter specifically stated that the article did not convey his opinion. Furthermore, the editors also testified that the article was an accurate investigative news story and not the opinion of the reporter or of the newspaper. Respondents and their employees stated that the only opinions in the article were the opinions of the quoted sources. Respondents have further argued that they have a qualified privilege for neutral reportage or fair comment. We agree with respondents' characterization of the article at trial, and hold that the article was intended as a statement of fact, and is not protected as an expression of opinion.

DECISION

The trial court's decision granting the JNOV is reversed, and the jury's verdict is reinstated.

Reversed.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF ST. LOUIS SIXTH JUDICIAL DISTRICT

Donald J. Diesen,

Plaintiff,

vs. ORDER FOR JUDGMENT NOTWITHSTANDING THE VERDICT

John Hessburg, Thomas Daly and Duluth News-Tribune and John Doe and Mary Doe, Court File No. 149375

Defendants.

The above-entitled matter came on for hearing before the undersigned, Judge of the District Court, on May 9, 1988, upon defendants' motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial. Appearing in support of defendants' motion was Thomas R. Thibodeau. Appearing in opposition to defendants' motion was Patrick T. Tierney.

The Court, having heard the arguments of counsel, having examined the records and files, and proceedings herein, and being fully advised in the premises, now makes the following Order:

IT IS HEREBY ORDERED:

1. That defendants' motion for judgment notwithstanding the verdict is hereby granted.

2. That judgment be entered in favor of defendants together with their costs and disbursements.

Let the hereto attached Memorandum be a part of this Order.

Dated at Duluth, Minnesota
this 23rd day of May, 1988.

BY THE COURT:

S/Jack J. Litman
Jack J. Litman
Judge of the District Court

Filed in my office at
_____ o'clock _____ m

May 23, 1988

Court Administrator
Joseph M. Lasky
Cindy DeBord Deputy

MEMORANDUM

This is an action for libel. Following the close of evidence, defendants moved for a directed verdict, on the grounds that each and every individual statement within the subject articles published by defendants was either true or protected opinion. This Court took the matter under advisement. The matter was then submitted to the jury. The Court advised the jury that each statement within the articles was true but that the members of the jury should consider whether there was a defamatory and false implication arising from the articles as a whole. The jury answered the question in the affirmative, and found for plaintiff.

At the time of defendants' motion for directed verdict, this Court determined that the matter should be submitted to the trier of fact. Defendants now bring a motion for judgment notwithstanding the verdict, on the grounds that, as a matter of law, there can be no action for libel based on a false implication arising from a series of true facts. The Court hereby grants defendants' motion, for the reasons discussed in this Memorandum.

Plaintiff Donald Diesen was, at the time the articles were published, the Carlton County Attorney -- a public official. Defendant Duluth Herald and News-Tribune published three articles in its Sunday, November 15, 1981 edition concerning the treatment received by victims of domestic abuse in Carlton County, and including a review of that county's legal response to domestic abuse complaints. It is undisputed that this is a matter of public concern.

Plaintiff has argued convincingly that an action for libel may lie where a series of true and accurate statements leads to a false and defamatory implication. A finding of falsity may be based on a false inference drawn from true facts. Dunlap v. Philadelphia Newspapers, Inc., 301 Pa.Super. 475, 448 A.2d 6 (1982). The literal accuracy of its separate statements will not render a communication true when the implication of the communication as a whole is false. Id. See also Lewis v. Equitable Life Assurance Society, 389 N.W.2d 876 (Minn. 1986). This rule undoubtedly applies to some cases, such as the cases and examples provided by plaintiff during his closing argument and in his briefs. The Court,

however, declines to find that this is such a case.

It is elementary that, in any defamation action, there must, at the outset, be an actionable statement, whether express or implied. Neither party here has provided a satisfactory articulation of the allegedly defamatory implication emanating from defendants' three articles. While plaintiff's argument is valid for the cases he suggest, it does not apply to the instant matter where the implication is one of vague derogation of plaintiff in his official capacity.

Plaintiff apparently sought to prove that the implication was phrased by the newspaper's attorney, John Killen, in his pre-publication advisory letter. Killen determined that the "main thrust" of the articles was that "for a variety of reasons, Carlton County is not enforcing the law with respect to assaults on women...This, of course, is a charge of misfeasance or malfeasance in office by the elected officials." Killen further wrote that "the obvious conclusion that the writer wishes the readers to draw is that Diesen ought to be replaced..." Plaintiff did not emphasize that this was the implied defamatory statement, however, and the jury was not so instructed.

Even were it clear that Killen's letter exactly expressed the actionable inference, plaintiff could not recover for its publication. There can be no libel by innuendo if the challenged communication is true and concerns public officers and public affairs even though a false implication may reasonably be drawn by the public. Strada v. Connecticut Newspapers, Inc., 193 Conn. 313, 477 A.2d 1005, 1006 (1984). The First Amendment prohibits placing the burden on the media to be vigilant against any possible defamatory implication which may arise from true facts reported about a public official. Strada, 477 A.2d at 1012.

Moreover, the implication expressed by Killen is a direct criticism of a public official; as such, it is opinion, and absolutely protected by the First Amendment. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 366 N.E.2d 1299 (1977), cert. denied, 434 U.S. 969, the plaintiff judge was accused of being "incompetent" and "probably corrupt" in defendants' book. In granting defendants' motion for summary judgment, the New York Court of

Appeals stated,

> To state that a Judge is incompetent is to express an opinion regarding the Judge's performance in office. Likewise, to advocate a Judge's removal from office is to express the opinion that the Judge is unfit for his office. Both opinions, even if falsely and insincerely held, are constitutionally protected, if the facts supporting the opinion are set forth.

Rinaldi, supra., 366 N.E.2d at 1306. Read in the most pejorative possible sense, the News-Tribune articles implied that plaintiff was unfit for office and should be removed. Under the Rinaldi analysis, that implication does not support an action for libel, as long as the underlying facts are set forth. The facts here were undeniably set forth; it is merely the inference from those facts that is alleged to be defamatory.

Plaintiff contends that the subject articles were not presented as the newspaper's or the reporter's opinion, but instead purported to be investigative collections of fact, objectively composed. Readers, therefore, would consider any implication arising from the articles as fact, and not simply the opinion of the publisher.

This Court must consider four factors in distinguishing statements of fact from statements of opinion under the First Amendment:

> (1) the precision and specificity of the disputed statement (the more imprecise, the more likely opinion);
>
> (2) the statement's verifiability (the less verifiable, the more likely opinion);
>
> (3) the literary and social context in which the statement was made (including the entire communication's tone, the use of cautionary language, the category of publication, it's style of writing, and intended audience); and
>
> (4) the statement's public context (consideration of the public or political arena in which the statement was made).

Capan v. Daugherty, 402 N.W.2d 561, 563 (Minn. App. 1987); Janklow v. Newsweek, Inc., 788 F.2d 1300 (8th Cir. 1986);

Ollman v. Evan, 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985). These factors must be considered together; no one criterion is dispositive of the issue. Janklow, 788 F.2d at 1302.

The first criterion - the precision or specificity of the statement, does not readily fit the facts of the instant case. As discussed above, plaintiff has not alleged, with certainty, a specific statement of the articles' implication. The disputed implication would appear to be vague and imprecise; simply an unarticulated derogation of Donald Diesen as county attorney. Even the Killen summary is substantially less precise than the cases or examples cited by plaintiff. For example, in Dunlap, supra, the article in question loudly proclaimed the manifest corruption of Philadelphia police; under a headline and above a story detailing the prevalent bribery of cops was a photograph of a city squad car. Its occupants were apparently accepting a package from a pedestrian. Officer Dunlap, the plaintiff, was mistakenly identified as the driver of that squad car. The obvious implication of the headline, article, photograph and caption was that Dunlap was shown accepting a bribe. Here, defendants are alleged to have impliedly charged plaintiff with a poor performance in some aspects of his job as county attorney. Each of the more specific charges and statements in the articles in the Duluth paper was, in fact, true.

The issue of verifiability is also difficult to apply to the instant facts. In a sense, any implication a reader might draw from the three articles is verifiable from the articles themselves, since they are entirely literally true. Without a method of verification with which to evaluate the statement, the trier of fact may improperly render a decision based upon approval or disapproval of the contents of the statement, its author, or its subject. Ollman, 750 F.2d at 981. Such a speculative verdict has obvious potential for quashing or muting First Amendment activity. Id. Absent a salient articulation of it, the articles' implication is not easily verifiable, either by the reading public or the members of the jury.

The literary or social context of the statement may put the reader on notice that it is merely opinion. Ollman, 750 F.2d at 983. The editors of the Duluth newspaper were careful to include cautionary language, to present opposing viewpoints, and to

recheck their facts, following the letters from plaintiff and advice from attorney Killen. "Where language of statements is cautiously phrased in terms of apparancy or is of a kind typically generated in a spirited legal dispute in which judgment, loyalties and subjective motives of the parties are reciprocally attacked and defended in the media and other public forums, the statements are less likely to be understood as statements of fact rather than as statements of opinion." Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980). It is true that, as plaintiff points out, the articles in question here were published in a daily newspaper as investigative, research items of news, and not as editorials or newsmagazine stories. Nevertheless, the reported words were generally both cautious and true; the reader should have understood that the advocates quoted and cited in the articles were just that: advocates for their legal or political position.

Finally, the public context in which the statements were made is crucial to the First Amendment discussion. Speech about government and its officers, about how well or how badly they carry out their duties, lies at the very heart of the First Amendment. Janklow, 788 F.2d at 1304. It is vital to our form of government that press and citizens alike be free to discuss and, if they see fit, impugn the motives of public officials. Id. "When we read charges and countercharges about a person in the midst of controversy, we read them as hyperbolic, as part of the combat, and not as factual allegations whose truth we may assume." Ollman (Bark, concurring), 750 F.d at 1002. Those who willingly participate in public debate must accept a degree of derogation that others need not. Id. As an elected public official, due for re-election during the coming year, plaintiff could expect to be in the midst of, and even the focus of, controversy. Any factual account of his performance as county must be considered within the ample province of First Amendment protections. The public should have found that any implications arising from the articles, even an implication that plaintiff was guilty of misfeasance or malfeasance in office, were opinions, and not statements of fact.

Together, the Janklow-Ollman criteria indicate that the implication arising from the articles as a whole was merely the

opinion of the author, the publisher, or the articles' sources. As opinion, it is constitutionally protected. This Court believes it likely that the jury impermissibly decided that the opinion expressed by the articles was wrong, rather than deciding that the implication of the articles was a false and defamatory statement of fact. Defendants' motion for judgment notwithstanding the verdict must be granted as a matter of law.

It is not necessary for the Court to discuss here the issue of actual malice. The Court declines to do so.

J.J.L.

STATE OF MINNESOTA

IN SUPREME COURT

C2-88-1345

Donald J. Diesen,

Appellant,

vs.

John Hessburg, Thomas Daly and
The Duluth News-Tribune,

Respondents.

ORDER

Based upon all the files, records and proceedings herein, IT IS HEREBY ORDERED that the petition of John Hessburg, Thomas Daly and The Duluth News-Tribune for further review of the decision of the Court of Appeals be, and the same is, granted. The petitioner shall proceed as the appellant and briefs shall be filed in the quantity, form and within the time limitations contained in Minn. R. Civ. App. P. 131 and 132. Counsel will be notified at a later date of the time for argument before this court. No requests for extensions of time for the filing of briefs will be entertained.

Dated:
5-12-89

BY THE COURT:

S/Peter Popovich
Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

C2-88-1345

Donald J. Diesen,

Respondent,

vs. ORDER

John Hessburg, et al.,
petitioners,

Appellants.

Based upon all the files, records, and proceedings herein,
IT IS HEREBY ORDERED that respondent's Petition for Rehearing be, and the same hereby is, denied in all respects.

Dated: August 29, 1990

BY THE COURT:

S/Peter S. Popovich
Peter S. Popovich, Chief Justice

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF ST. LOUIS SIXTH JUDICIAL DISTRICT

Donald Diesen,

Plaintiff,

vs. SPECIAL VERDICT FORM

John Hessburg, Thomas Daly, and Duluth News-Tribune and Joe Doe and Mary Doe, File No. 149375

Defendants.

We, the Jury duly impaneled and sworn to try the issues in the above-entitled case, do hereby make answer to the questions propounded by the Court as follows:

1. Were the articles published by Defendants defamatory to Donald Diesen?

ANSWER: Yes __X__ No _____

ONLY if you answered "yes" to Question No. 1 will you answer Question No. 2.

2. Was the implication of the articles published by Defendants substantially false?

ANSWER: Yes __X__ No _____

ONLY if you answered "Yes" to Question No. 2 will you answer Question No. 3

3. Did the Plaintiff demonstrate by clear and convincing evidence that the Defendants knew that the implication of the articles was substantially false?

ANSWER: Yes _____ No __X__

If your answer to Question No. 3 was "Yes" you will answer Question No. 5.

If your answer to Question No. 3 was "No" you will answer Question No. 4.

4. Did Plaintiff prove by clear and convincing evidence that the Defendants published the articles with reckless disregard as to the truth or falsity of the implication of said articles?

ANSWER: Yes X No _____

ONLY if you answered "Yes" to either Question No. 3 or 4 will you answer the following Question.

5. What damages, if any, did Plaintiff Donald Diesen sustain as a result of the publication of the articles?

$ 285,000

6. Did Plaintiff prove by clear and convincing evidence that the articles were published willfully, maliciously, and with the intent to injure the Plaintiff Donald Diesen?

ANSWER: Yes X No _____

ONLY if you answered "Yes" to Question No. 6 will you answer the following Question.

7. Are the Defendants liable for punitive damages?

ANSWER: Yes X No _____

ONLY if your answer to Question No. 7 was "Yes" will you answer the following Question.

8. How much in punitive damages are Defendants liable?

$ 500,000

_____
Foreperson

Jurors concurring sign here:

1. _____ 4. _____
2. _____ 5. _____
3. _____ 6. _____
7. _____

Dated at Duluth, Minnesota, this _____ day of May, 1988.

After six hours of deliberation seven jurors may agree upon and return a verdict. When the verdict is agreed to by seven jurors only (after six hours deliberation) all the jurors who agree to the verdict should sign the same and the time of the agreement should be noted.

No. 90-854

In The

Supreme Court of the United States

October Term, 1990

DONALD J. DIESEN,

Petitioner-Cross-Respondent,

vs.

JOHN HESSBURG, THOMAS DALY, AND THE DULUTH NEWS-TRIBUNE,

Respondents-Cross-Petitioners.

On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether petitioner-cross-respondent has shown a federal question as well as special and important reasons justifying review on writ of certiorari as required by Sup.Ct.R. 10.1.

PARTIES TO THE PROCEEDING

Respondent-cross-petitioner John Hessburg ("reporter") was formerly employed by respondent-cross-petitioner *Duluth News-Tribune* as a newspaper reporter. He now lives and works in Seattle, Washington.

Respondent-cross-petitioner Thomas Daly ("editor") was formerly employed by respondent-cross-petitioner *Duluth News-Tribune* as the newspaper's executive editor. He now lives and works in Napa, California.

Respondent-cross-petitioner *Duluth News-Tribune* ("newspaper") is a daily newspaper of general circulation serving, among other areas, northeastern Minnesota, including Carlton County, Minnesota.

Petitioner-cross-respondent Donald J. Diesen ("Mr. Diesen") was at the relevant time the duly elected County Attorney for Carlton County, Minnesota. He concedes he was a public official as that phrase is used in First Amendment libel law. Petition at ii. He currently lives and works as a private attorney in Carlton County, Minnesota.

RULE 29.1 STATEMENT

Respondent-cross-petitioner *Duluth News-Tribune* is a division of Northwest Publications, Inc. which is wholly owned by Knight-Ridder Newspapers, Inc.

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No. 90-854

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On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTIONAL STATEMENT

As demonstrated in the main body of this brief this Court lacks jurisdiction due to the absence of a federal question.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

U.S. Const. amend. XIV, §1, provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Minn. Const. art. I, §3, provides that "The liberty of the press shall forever remain inviolate, and all persons may freely speak, write and publish their sentiments on all subjects, being responsible for the abuse of such right."

STATEMENT OF THE CASE

I. THE ARTICLES.

This action stems from three articles published in the newspaper's Sunday edition on November 15, 1981. At that time Mr. Diesen served as the elected County Attorney for Carlton County, Minnesota. The county is located about 20 miles south of Duluth, Minnesota, where the newspaper is published. The articles addressed the handling of battered women cases by the Carlton County law enforcement and judicial systems. The articles appear in this brief's appendix.

The first article cited critics of the Carlton County system who contended that battered women in the county faced a hard road to justice. A study of court records indicated that men who battered women seldom faced felony charges. The article noted that in most cases domestic assault charges were dismissed or assailants who pled guilty were placed on probation after receiving stayed sentences. The article concluded by describing specific cases which "raise serious questions about whether the county vigorously prosecutes and sentences men who batter women."

The second article examined the case of Kathy Berglund. Ms. Berglund was twice brutally attacked by her estranged husband, Melvin DeFoe. Despite the egregious circumstances Mr. DeFoe was not prosecuted for a felony nor was he sentenced to any time in jail. The article cited advocates for battered women, including Ms. Berglund's attorneys, who agreed that an injustice had been done to Ms. Berglund. It also presented the position of law enforcement and judicial officers with regard to the Berglund case. Both Mr. Diesen and the sentencing judge commented at length on their handling of the case. The Carlton County Sheriff, a supporter of Mr. Diesen, was quoted.

The third article focused on the county attorney, his record and his treatment of battered women cases. It began:

> Critics of Carlton County Attorney Donald Diesen contend he's an obstacle to justice for battered women.
>
> . . . .

> On the other hand, Diesen is seen by supporters – and even some hard line opponents – as scrupulously honest, a soft-spoken gentleman, a man who works hard and is not controlled by any special interests. Diesen's backers say he's fair minded and cares deeply about his work.

Sources favorable and unfavorable to Mr. Diesen were quoted in the article.

II. THE NEWS GATHERING ACTIVITY.

In the spring of 1981 the newspaper received a complaint that Carlton County did not prosecute men who battered women. The reporter assigned to the story, John Hessburg, met with advocates for battered women as well as women who had been battered. He then examined every Initial Complaint Report (ICR) on every assault of every kind in Carlton County. He spent 70% of his time on this phase of the investigation. He reduced the several thousand ICRs to 44 which involved domestic assault. He then developed flow charts which indicated the dispositions of these 44 cases. The reporter examined the county system in order to ascertain who had dealt with the women involved in those 44 cases.

Several interviewees had expressed concerns about the county attorney. The reporter therefore scheduled interviews with Mr. Diesen and his supporters. He kept his editors apprised daily about the information he gathered, and he frequently sought their counsel and advice. The editors closely supervised the reporter and reviewed the accuracy of his information. After the interview with Mr. Diesen the reporter interviewed other attorneys and sources, both favorable and unfavorable to Mr. Diesen,

and he returned to his original sources to double-check information.

The reporter obtained affidavits from the battered women he interviewed. He did this to be sure that the women realized the seriousness of what they were doing and to test their veracity and sincerity. The stories that could not be independently verified were not published. Contrary to Mr. Diesen's characterization, the newspaper never concluded that Jennifer Greensky's accusations were false. The Greensky story was not published because it could not be independently verified. It was a question of Ms. Greensky's word versus Mr. Diesen's word. It was never demonstrated that the accusation she made was false.

The editors independently confirmed the reporter's information prior to publishing the articles. Georgia Swing, city editor, visited the Carlton County courthouse on two occasions to look up the dispositions of files and to verify information used by the reporter for his story. On her second visit, Ms. Swing was accompanied by Dennis Buster, also a city editor. The two spoke to some of the people at the courthouse and examined files.

Ms. Swing found no discrepancies in the reporter's facts during either of her visits to Carlton. She found everything was accurate, and she so informed her superiors. Ms. Swing also edited the articles. She was looking for accuracy, and she made sure that all of the printed material was supported. Mr. Buster discussed the progress of the stories with the reporter on a daily basis. He traveled to the Carlton County Courthouse with Ms. Swing. He spent several hours listening to the tapes the

reporter made of interviews with witnesses. He reported to Larry Fortner, managing editor, that there were no inaccuracies between what was on the tape and what had been written by the reporter.

Mr. Fortner also reviewed much of the paperwork that was generated as the stories were prepared in addition to reviewing the stories themselves. Both Ms. Swing and Mr. Buster reported to Mr. Fortner that the information used in the articles had been double- and triple-checked, was accurate, and had been obtained in a responsible manner. Mr. Fortner testified that the articles contained only information that was available through the public records or which was attributed to some named person. Mr. Fortner testified that he had no doubt that the articles published were true.

Thomas Daly, executive editor of the News-Tribune in 1981, was apprised of the investigation from time to time. He testified that the newspaper did a thorough, complete job and that he had no doubt that everything printed was true. John McMillion, publisher of the newspaper at the time, testified that he knew of nothing false in the articles. He felt the articles were very fair and very balanced.

Nonetheless, because Mr. Diesen had written to the newspaper alleging unfairness by the reporter, the newspaper consulted its attorney prior to publishing the articles. The attorney, John Killen, testified that he reviewed the articles. He advised the newspaper that it is permissible to criticize public officials and that the articles were not libelous. He wrote a letter to the newspaper in which he concluded that though the articles raised a question as

to whether the county attorney was doing his job properly, this was not libelous.

Following publication of the articles, affidavits were obtained from twelve individuals who had contributed to the articles, including victims, attorneys, and those involved in the publication of the articles. The affiants stated that the statements attributed to them in the articles were accurate and were not published with malice or with reckless disregard for the truth.

III. THE TRIAL.

The newspaper presented testimony from the victims whose stories were told in the articles. Kathy Berglund dramatically and emotionally testified about the two assaults which she suffered at the hands of Melvin DeFoe. Her testimony agreed with the newspaper accounts. She testified that she wanted Mr. DeFoe prosecuted after the first assault. She stated that if Mr. Diesen had prosecuted Mr. DeFoe after this incident, she "would never have had to go through the second beating" and "probably wouldn't have the fear I have today."

After the second assault, Ms. Berglund and her advocates met with Mr. Diesen to try to get him to issue a felony charge. The sheriff also attended this meeting. Despite the savagery of the two attacks, Mr. DeFoe was not prosecuted for a felony. Ms. Berglund testified that she was not happy with the outcome of the cases. She also testified that her story was dealt with accurately in the articles.

Marjorie Wallin (now Millette), another victim, testified about her beating and kidnapping. Following the incident Ms. Millette contacted the police and filed a complaint. She testified that she repeatedly told Mr. Diesen that she wanted her husband prosecuted and that she was willing to testify. Nonetheless the charges against her husband were plea-bargained down to a misdemeanor by Mr. Diesen without her knowledge. Her husband received only one-year's probation. Ms. Millette testified that the articles dealt with her situation accurately.

Four paragraphs of the articles dealt with the "Chip" Martin case. Mr. Diesen contends that important facts were omitted from the description of this case. Petition at 3-4. However, he cites only one: The police officer's claim that his investigation established facts justifying no prosecution. The reporter testified that he never discussed the Martin case with the officer. The tape of the officer's interview made no mention of the Martin case.[1]

Battered women's advocates and attorneys quoted in the articles testified at trial. All said that they had been quoted accurately and that the articles fairly represented how Carlton County did or did not prosecute domestic abuse cases. The testimony of two advocates was based on their involvement with battered women and battered women's shelters in the area. Both were familiar with Ms.

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[1] Mr. Diesen alleges tampering with the tape recording of his own interview. Petition at 4. The sole basis for that allegation is Mr. Diesen's own speculation. Mr. Diesen never claimed to be an expert on tape recordings, and *no* expert evidence in this regard was ever presented.

Berglund's situation, as well as the claims made by others, including Ms. Greensky.

Supporters of Mr. Diesen were also quoted in the articles, including the sheriff, a police officer, an assistant county attorney, and a defense attorney. The supporters of Mr. Diesen who testified said that quotations attributed to them in the articles were fair and accurate.

IV. TRIAL PROCEEDINGS.

At the close of all the evidence the newspaper moved for a directed verdict. The trial court took the motion under advisement but said that if the jury ruled in favor of Mr. Diesen, "The court would be inclined to either grant a judgment notwithstanding the verdict in favor of the defendant, or . . . grant the motion that has now been requested by the defendant."

The trial court held as a matter of law that all statements in the articles were true and so instructed the jury. Mr. Diesen properly admits he "never challenged the trial court's ruling that the individual statements were true." Petition at 19. The jury ruled that the newspaper acted with reckless disregard as to the truth or falsity of the articles' alleged implication and awarded compensatory damages of $285,000 and punitive damages of $500,000. Petitioner's App. at 72A.

V. POST-TRIAL PROCEEDINGS.

The newspaper moved the trial court for judgment notwithstanding the verdict. The motion argued that as a matter of law Mr. Diesen should not have been allowed to

proceed under the implication theory and that it was error to instruct the jury and submit a special verdict form on that theory. The motion also argued that actual malice was not proved by clear and convincing evidence and that punitive damages should not have been allowed.

The trial court granted the newspaper's motion. Petitioner's App. at 62A. The trial court held that the libel by implication theory was not actionable and that the alleged implication was protected "criticism of a public official." Petitioner's App. at 64A-65A.

Mr. Diesen then appealed to the Minnesota Court of Appeals. A three-judge panel of the 15 member intermediate court, not a "unanimous Court of Appeals" as Mr. Diesen claims at page 7 of the petition, reversed and reinstated the jury's verdict. *Diesen v. Hessburg*, 437 N.W.2d 705, 712 (Minn.Ct.App. 1989). Petitioner's App. at 48A.

The newspaper sought and was granted further review of the intermediate appellate court's decision by the Minnesota Supreme Court. Petitioner's App. at 70A. The Minnesota Supreme Court's decision was filed on May 11, 1990. *Diesen v. Hessburg*, 455 N.W.2d 446 (Minn. 1990). Petitioner's App. at 1A. The court of appeals was reversed and the trial court's grant of judgment notwithstanding the verdict was upheld.

Following the state supreme court decision, Mr. Diesen petitioned for rehearing. While that petition was pending this Court handed down its opinion in *Milkovich v. Lorain Journal Co.*, ___ U.S. ___, 110 S.Ct. 2695 (1990). The Minnesota Supreme Court ordered informal briefs arguing the applicability of *Milkovich* "to the above-entitled matter." A1. Briefs were submitted by Mr. Diesen

and the newspaper. Mr. Diesen tries to minimize the state court's careful consideration of *Milkovich* by saying that the state court was "made aware" of the case. Petition at 11. Mr. Diesen made the Minnesota Supreme Court aware of the case with a 20 page, 8½ x 11 brief.

Notwithstanding *Milkovich* and the new briefs discussing that case, the Minnesota Supreme Court denied rehearing on August 29, 1990. Petitioner's App. at 71A.

Throughout his petition Mr. Diesen insinuates that the newspaper accepted the jury's defamation, falsity, actual malice and punitive damages findings. *See e.g.* petition at 6, 16 n. 6, 25 n. 8. Nothing could be further from the truth. When the trial court granted the newspaper judgment notwithstanding the verdict appeal by the newspaper from the verdict became moot. Mr. Diesen became the appellant.

At that stage of the proceedings no final order or judgment adverse to the newspaper had been entered on the jury's findings. Minnesota's appellate rules allow an appeal only from an order or judgment. Minn.R.Civ.App.P. 103.03. No appeal can be taken from an interstitial fact finding. *Id.; Johnson v. Am. Economy Ins. Co.*, 419 N.W.2d 126, 128, n. 1 (Minn.Ct.App. 1988); *cf. Walsh v. Kuechenmeister*, 196 Minn. 483, 492, 265 N.W. 340, 344 (1936) (an appellant must be "an 'aggrieved party,' and he cannot complain of errors that . . . did not operate to his disadvantage." [citation omitted]).

Nor could the newspaper obtain review of the jury's findings through a notice of review, the Minnesota equivalent of a cross-appeal. Minn.R.Civ.App.P. 106. Again,

that rule allows review only of an adverse "judgment or order." *Id.; Johnson v. Am. Economy Ins. Co., supra.* Thus the case went to the Minnesota Court of Appeals solely on Mr. Diesen's appeal. When the case reached the Minnesota Supreme Court the newspaper became the appellant and vigorously argued the jury's defamation, falsity, actual malice and punitive damages findings.

REASONS FOR DENYING THE WRIT

I. THIS COURT LACKS JURISDICTION DUE TO THE ABSENCE OF A FEDERAL QUESTION. THE STATE COURT DECIDED THE CASE ON ADEQUATE AND INDEPENDENT STATE COMMON LAW AND STATE CONSTITUTIONAL GROUNDS. MR. DIESEN HAS NO FEDERAL RIGHT TO PURSUE A LIBEL CLAIM.

The review sought by Mr. Diesen "is not a matter of right, but of judicial discretion." Sup.Ct.R. 10.1. This Court will not exercise that discretion unless "there are special and important reasons therefor." *Id.* Such reasons include an apparently erroneous decision by a federal Court of Appeals. Sup.Ct.R. 10.1(a). Since this case was never argued to a federal Court of Appeals the petition can be granted only if it satisfies some other jurisdictional basis.

All other certiorari jurisdiction rules and statutes require a federal question. Subpart .1(b) of this Court's rule 10 addresses federal questions decided by a state court of last resort. Subpart .1(c) addresses "an important question of federal law" and other federal questions decided by state courts or federal circuit courts. The

jurisdictional statute invoked by Mr. Diesen, 28 U.S.C. §1257(a), confers jurisdiction on this Court only when the state court decision implicates a federal statute, treaty, law, commission or authority, or implicates the federal Constitution. As the petitioner Mr. Diesen has the burden of establishing Supreme Court jurisdiction. *Durley v. Mayo*, 351 U.S. 277, 285 (1956), *reh'g denied*, 352 U.S. 859 (1956).

This Court strictly follows the federal question requirement in certiorari cases. In *N.Y. Times Co. v. Jascalevich*, 439 U.S. 1317, 1318 (1978), *reapplication denied*, 439 U.S. 1331 (1978), Mr. Justice White wrote:

> [I]t is only final judgments with respect to issues of federal law that provide the basis for our appellate jurisdiction with respect to state-court cases.

In *Herb v. Pitcairn*, 324 U.S. 117, 125-6, 128 (1945), this Court stated:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [citations omitted] . . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion. . . . It is our purpose scrupulously to observe the long standing rule that we will not review a judgment of a state court that rests on an adequate and independent ground in state law.

See also Mich. v. Long, 463 U.S. 1032, 1040-2 (1983).

A state court may decide a case on state law grounds even if the result would be different under federal law. In *Ill. v. Gates*, 462 U.S. 213, 222 (1983), *reh'g denied*, 463 U.S. 1237 (1983), this Court said:

> [W]e permit a state court, even if it agrees with the State [of Illinois] as a matter of federal law, to rest its decision on an adequate and independent state ground. Illinois, for example, adopted an exclusionary rule as early as 1923 [citation omitted], and might adhere to its view even if it thought we would conclude that the federal rule should be modified.

This Court "would not, of course, invalidate state law simply because we doubt its wisdom." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974). In *Milkovich v. Lorain Journal Co., supra*, ___ U.S. at ___, 110 S.Ct. at 2698, n. 5, a case much cited by Mr. Diesen, this court acknowledged that the Ohio Supreme court was "free . . . to address all of the foregoing issues on remand" under Ohio law.

The issue here is: Did the Minnesota Supreme Court decide a federal question, or did the Minnesota Supreme Court rest its decision on adequate and independent state law grounds? As a matter of libel common law and by express declaration of the state court this case does not involve a federal question but instead was decided on adequate and independent state common law and state constitutional grounds.

1. **Libel Common Law In General.** The law of libel evolved through siegniorial, ecclesiastical and common law courts and arrived in our country as part of the common law of the several states. W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on The Law of*

Torts, §111 (5th ed. 1984). Libel law is a matter of "state interest," *Gertz v. Robert Welch, Inc., supra*, 418 U.S. at 341, and "recognized throughout the States" as a matter of "state law." *Farmers Educ. and Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525, 535 (1959). Libel is a "state-created tort action[ ]." *Curtis Publishing Co. v Butts*, 388 U.S. 130, 160 (1967), *reh'g denied*, 389 U.S. 889 (1967). "There is no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

Until 1964 state libel common law had no relationship whatsoever to federal substantive law. This Court then decided *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964). There this Court held that the First and Fourteenth Amendments "delimit" state law in libel suits brought by public officials against newspapers. *Id.*, 376 U.S. at 264, 279-80, 283. That case did not create any new libel causes of action but instead placed a limit on previously available state law causes of action. For example, in *Milkovich v. Lorain Journal Co., supra*, ___ U.S. at ___, 110 S.Ct. at 2698, this court held that "the First Amendment does not prohibit the application of Ohio's libel laws to the alleged defamations." If Ohio had not recognized in the first instance Mr. Milkovich's cause of action that case never would have reached this Court.

Notwithstanding *N.Y. Times Co. v. Sullivan, supra*, and its progeny, in a libel case the underlying substantive claim remains a creature of state common law. If state common law does not recognize the libel theory of a plaintiff's case then neither the First Amendment nor any other federal issues need be addressed. They are moot.

Here the Minnesota Supreme Court correctly noted that Mr. Diesen was asking it "to recognize a legal theory . . . which is a question of law." *Diesen v. Hessburg, supra,* 455 N.W.2d at 449. Petitioner's App. at 5A. The state high court declined to do so under state common law. When the Minnesota Supreme Court said that "there was no defamatory 'speech' as a matter of law" and that Mr. Diesen's theory "is generally not actionable" it could only have been referring to claims actionable under Minnesota's common law. *Diesen v. Hessburg, supra,* 455 N.W.2d at 452. Petitioner's App. at 11A. Concurring Justice Simonett, citing Minnesota case law precedent, similarly held that "articulation of the defamatory implication is a question of law for the court to decide." *Diesen v. Hessburg, supra,* 455 N.W.2d at 455. Petitioner's App. at 44A.

The Minnesota court's holding lies uniquely within the domain of a state court. Federal courts

> . . . do not have the same power to reconsider interpretations of state law by state courts in which a decision has been rendered. The [state] Supreme Court had the power to reconsider and overrule its former interpretation, but the [federal] court below did not.

Moore v. Ill. Cent. R. Co., 312 U.S. 630, 633 (1941); *see also Erie R. Co. v. Tompkins, supra,* 304 U.S. at 78.

This Court cannot require the State of Minnesota to adopt the libel by implication theory as part of the state's common law. What other state and federal courts or the *Wall Street Journal* may say about the theory simply has no bearing on the common law of Minnesota. A ruling by

this Court would be nothing more than the kind of advisory opinion prohibited by *Herb v. Pitcairn, supra.* Without a state common law libel theory upon which to proceed federal questions are moot. Mr. Diesen has no separate federal right to assert a libel claim not recognized by state common law. *Erie R. Co. v. Tompkins, supra,* 304 U.S. at 78. These general principles of federalism and common law deprive this Court of jurisdiction.

2. Express Declaration By The State Court As To State Defamation Law. The Minnesota Supreme Court expressly held that its decision was based on state law, not federal law. *Diesen v. Hessburg, supra,* 455 N.W.2d at 452, Petitioner's App. at 10A. The state court first reviewed Minnesota law as to the truth, privilege and fair comment doctrines. *Diesen v. Hessburg, supra,* 455 N.W.2d at 452, Petitioner's App. at 10A, citing *Stuempges v. Parke, Davis & Co.,* 297 N.W.2d 252 (Minn. 1980), and *Lewis v. Equitable Life Assurance Soc'y,* 389 N.W.2d 876 (Minn. 1986). For example, decades before this Court decided *N.Y. Times Co. v. Sullivan, supra,* the Minnesota Supreme Court said a newspaper may:

> . . . denounce his [public official's] conduct as dishonorable. The methods by which a public officer continues to retain his hold on a public office are as much a matter of public concern, and as much subject to criticism, as the methods by which he originally obtained, or sought to obtain, the office. If he has resorted to a dishonorable trick, it is proper to publish the fact. Every one has a right to comment fairly, and with an honest purpose, on the conduct of public officials.

Wilcox v. Moore, 69 Minn. 49, 52, 71 N.W. 917, 918 (1897).

The state supreme court then extended state law to cases of alleged libel by implication brought by a public official against a newspaper. Minnesota's highest court updated state law and held:

> Thus, while first amendment and other policy considerations underlie this restraint, we note our decision here is rooted in state defamation law.

Diesen v. Hessburg, supra, 455 N.W.2d at 452. Petitioner's App. at 10A.

In addition to Minnesota's common law the state court decision rests upon Minnesota constitutional law. In its brief to the Minnesota Supreme Court the newspaper argued the applicability of Minn. Const. art. I, § 3, quoted above, which, similar to the First Amendment, guarantees "liberty of the press." The Minnesota Supreme Court:

> has long recognized that individual liberties under the state constitution may deserve greater protection than those under the broadly worded federal constitution.

State v. Hershberger, 462 N.W.2d 393, ___ (Minn. 1990). A state may interpret its own constitution so as to afford greater liberties than those afforded by the federal constitution. *Or. v. Hass,* 420 U.S. 714, 719 (1975). By deciding a case on state constitutional grounds a state court "immunizes its decision from review by this Court." *Payton v. N.Y.,* 445 U.S. 573, 600 (1980).

The Minnesota Supreme Court's express reference to state defamation law followed the advice of this Court given in *Mich. v. Long, supra.* There this court advised state courts on how to indicate whether a decision is based on state or federal law:

> If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course, will not undertake to review the decision.

Mich. v. Long, supra, 463 U.S. at 1041. The Minnesota Supreme Court made exactly this kind of plain statement.

Mr. Diesen in his first "Question Presented" and elsewhere mischaracterizes the holding of the Minnesota Supreme Court. Contrary to Mr. Diesen's assertion the state court never held that his claim was "precluded by the First Amendment" or federal "constitutional concerns." Petition at i, 21. Nor did the state court create "a separate standard of falsity for public officials" based on federal law as Mr. Diesen claims. Petition at 10. Mr. Diesen improperly attempts to deflect this Court's attention from the state court's crucial holding that "our decision here is rooted in state defamation law." *Diesen v. Hessburg, supra,* 455 N.W.2d at 452. Petitioner's App. at 10A. Mr. Diesen relegates this dispositive jurisdictional holding to a mere footnote. Petition at 10.

As a matter of state common law and state constitutional law, and as a matter of express pronouncement by the Minnesota Supreme Court, the case before this Court presents no federal question. To the contrary, the case

was decided upon adequate and independent state common law and constitutional grounds which forestall federal appellate review even if federal law would produce a different result. In addition Mr. Diesen has no separate federal right to pursue a libel claim. This Court lacks jurisdiction and the petition must be denied.

II. ASSUMING WITHOUT ADMITTING THAT THIS COURT HAS JURISDICTION TO REVIEW THIS CASE, IN LIGHT OF THE STATE COURT'S ACTUAL MALICE HOLDING THERE ARE NO SPECIAL AND IMPORTANT REASONS JUSTIFYING FURTHER REVIEW BY THIS COURT.

In libel cases brought by public officials the Constitution requires a unique and comprehensive scope of review on appeal.

> The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 (1984), *reh'g denied*, 467 U.S. 1267 (1984). *See also Harte-Hanks Communications, Inc. v. Connaughton*, ___ U.S. ___, ___, 109 S.Ct. 2678, 2694-5 (1989) (actual malice is a question of law).

The Minnesota Supreme Court recognized its constitutional duty independently to review the record for

proof of actual malice. *Diesen v. Hessburg, supra,* 455 N.W.2d at 452-3. Petitioner's App. at 11A-13A. After analyzing Mr. Diesen's contentions and various precedents the state court held:

> There was no evidence the Newspaper doubted the accuracy of the published articles. To the contrary, quotations and documents were rechecked, interviews and notes were reviewed, statements often were presented with cautionary language, and stories that could not be independently verified were not used. Journalism Professor Holsinger testified no journalism standards were violated . . . [A]ctual malice was not established here as a matter of law.

Diesen v. Hessburg, supra, 455 N.W.2d at 453-4. Petitioner's App. at 13A-14A. Concurring Justice Coyne added:

> I concur in the result reached by the majority because I do not find reckless disregard for the truth amounting to actual malice in the constitutional sense.

Diesen v. Hessburg, supra, 455 N.W.2d at 456. Petitioner's App. at 47A.

Actual malice of course was an indispensable element of Mr. Diesen's case. *N.Y. Times Co. v. Sullivan, supra,* 376 U.S. at 283. He failed to prove it by clear and convincing evidence. For that reason alone he could not prevail in this case even if the state court erred in its analysis of the libel by implication theory. Again, a ruling by this Court on the implication theory would be nothing more than the kind of advisory opinion prohibited by *Herb v. Pitcairn, supra.*

Mr. Diesen's only attack on the state court's actual malice holding appears at pages 24-6 of the petition. He

alleges that the state court "erred by refusing to consider evidence of common law malice" when evaluating actual malice. Innumerable factors prove or disprove actual malice. The Minnesota Supreme Court discussed many of them. *Diesen v. Hessburg, supra,* 455 N.W.2d at 452-4. Petitioner's App. at 11A-14A. To single out alleged error in the evaluation of one factor simply does not present "special and important" reasons for granting the writ. Sup.Ct.R. 10.1.

In any event the state court correctly evaluated common law malice. It pointed out that actual malice is sometimes confused with common law malice. *Diesen v. Hessburg, supra,* 455 N.W.2d at 453, Petitioner's App. at 12A, citing *Harte-Hanks Communications, Inc. v. Connaughton, supra.* It then said that ill will is "irrelevant" when proving knowledge of falsity or reckless disregard for the truth. *Id.* The state court was responding to and rejecting Mr. Diesen's claim that the reporter's alleged ill will, improper motive and adversarial stance proved malice in the constitutional sense. It is hardly fair of Mr. Diesen to accuse the state court of "ignoring" common law malice. Petition at 26.

The Minnesota Supreme Court correctly followed the instructions of this Court given in *Harte-Hanks Communications, Inc. v. Connaughton, supra,* ___ U.S. at ___, 109 S.Ct. at 2685, n. 7:

> It also is worth emphasizing that the actual malice standard is not satisfied merely through a showing of ill will or "malice" in the ordinary sense of the term. . . . The phrase "actual malice" is unfortunately confusing in that it has nothing to do with bad motive or ill will.

Regardless of the reporter's alleged ill will, the plain constitutional fact remains: "There was no evidence the Newspaper doubted the accuracy of the published articles." *Diesen v. Hessburg, supra,* 455 N.W.2d at 453. Petitioner's App. at 13A.

The Minnesota Supreme Court correctly evaluated actual malice. Mr. Diesen's reference to common law malice falls far short of showing that the state court erred. In light of the actual malice holding there are no special and important reasons justifying further review by this Court.

III. ASSUMING WITHOUT ADMITTING THAT THIS COURT HAS JURISDICTION TO REVIEW THIS CASE, THE MINNESOTA SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISION IN *MILKOVICH V. LORAIN JOURNAL CO.* THUS OBVIATING ANY NEED FOR FURTHER REVIEW BY THIS COURT.

In *Milkovich v. Lorain Journal Co., supra,* ___ U.S. at ___, 110 S.Ct. at 2705, this Court rejected a "wholesale defamation exemption for anything that might be labeled 'opinion'." However this Court still requires that the statement be "provable as false," "contain a provably false factual connotation" or can be "reasonably . . . interpreted as stating actual facts." *Id.,* ___ U.S. at ___, 110 S.Ct. at 2706. Any alleged connotation must be "sufficiently factual to be susceptible of being proved true or false." *Id.,* ___ U.S. at ___, 110 S.Ct. at 2707. A plaintiff must show a "core of objective evidence." *Id.*

Although the Minnesota Supreme Court cited pre-*Milkovich* law, as it turned out the state court applied

what was to be the *Milkovich* holding. The state court looked to the statements' "specificity and verifiability." *Diesen v. Hessburg, supra,* 455 N.W.2d at 451. Petitioner's App. at 8A. These criteria match this Court's references to objective and provable falsity. The state court then held that the "allegedly false implication here arguably was unspecific and unverifiable." *Id.* That is to say, Mr. Diesen failed to prove a false statement as required by *Milkovich* and *Philadelphia Newspapers, Inc. v. Hepps,* 475 U.S. 767, 777 (1986). Similarly, concurring Justice Simonett held that the alleged implication was "not provable one way or the other" and that it was "not . . . proven to be false." *Diesen v. Hessburg, supra,* 455 N.W.2d at 456. Petitioner's App. at 46A-47A.

The state court ordered and received briefs analyzing *Milkovich* in connection with Mr. Diesen's petition for rehearing. Rehearing was nonetheless denied because *Milkovich* does not change the result here or, more likely, *Milkovich* does not alter state law in which the decision was rooted.

Mr. Diesen's case suffered not from a fact vs. opinion defect, but instead from his failure to define a provably false implication from the articles. Articulation of the articles' implication is a question of state defamation law for decision by the trial court, not a question of fact. In *Utecht v. Shopko Dept. Store,* 324 N.W.2d 652, 653 (Minn. 1982), the Minnesota Supreme Court held:

> The question whether a claimed defamatory innuendo is reasonably conveyed by the language used is for the court to determine.

And in *Marudas v. Odegard,* 215 Minn. 357, 358-9, 10 N.W.2d 233, 234 (1943), the state supreme court held:

> It is for the court to determine whether the construction of the language put forward by the innuendo is permissible.

In granting the newspaper judgment notwithstanding the verdict the trial court held:

> Neither party here has provided a satisfactory articulation of the allegedly defamatory implication emanating from defendants' three articles. . . . [T]he implication is one of vague derogation of plaintiff in his official capacity.

Petitioner's App. at 65A. Concurring Minnesota Supreme Court Justice Simonett agreed. *Diesen v. Hessburg, supra,* 455 N.W.2d at 455, Petitioner's App. at 44A ("The implication is that Diesen . . . was a poor prosecutor.").

Mr. Diesen took no appeal from the trial court's articulation of the articles' implication. That ruling became the law of the case. To this day however Mr. Diesen stubbornly and wrongly characterizes the implication as a question of fact. *See e.g.* petition at 15, n. 5. Mr. Diesen failed as a matter of Minnesota law to convince the trial court of his version of the implication, misfeasance or malfeasance in office.

The trial court's unreviewable articulation of the implication simply cannot be proved either true or false under the *Milkovich* rule, whether the implication is fact, opinion or a hybrid of both. The *Milkovich* holding does not change the result of this case, and *Milkovich* does not present special and important reasons for further review of this case.

CONCLUSION

This court lacks jurisdiction due to the absence of a federal question. The state court decided the case on adequate and independent state law grounds. Mr. Diesen has no federal right to pursue a libel claim. Even if this court had jurisdiction the state court's actual malice holding obviates any need for further review. Nor does this Court's holding in *Milkovich v. Lorain Journal Co.* change the result in this case.

Mr. Diesen has failed to show a federal question as well as special and important reasons justifying review on writ of certiorari as required by Sup.Ct.R. 10.1. The petition must be denied.

Dated: December 26, 1990

Respectfully submitted,

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STATE OF MINNESOTA
IN SUPREME COURT
C2-88-1345

Donald J. Diesen,

Respondent,

vs.

John Hessburg, et al., petitioners,

Appellants.

ORDER

WHEREAS, the United States Supreme Court has issued its decision in *Milkovich v. Lorain Journal Co.*, ___ U.S. ___ (filed June 21, 1990);

IT IS HEREBY ORDERED that the parties shall serve and file informal letter briefs not exceeding 20 pages addressing the applicability of *Milkovich* to the above-entitled matter. Said briefs shall be served and filed simultaneously on or before August 3, 1990.

Dated:

7-13-90

BY THE COURT:

OFFICE OF
APPELLATE COURTS

/s/ Peter S. Popovich
Chief Justice

JUL 13, 1990
FILED

Duluth News-Tribune

SUNDAY 75¢

Our 112th year - No. 294 Duluth, Minnesota Sunday, November 15, 1981

Is justice denied battered women in Carlton County?

On Page 10: The case of Kathy Berglund, Carlton County attorney criticized.

By John Hessberg

CARLTON – Battered women in Carlton County face a hard road to justice, critics of the system contend.

Men who batter women seldom face felony charges in court and seldom go to jail for their offenses, a study of county court records shows.

If the assailants are charged with felonies, those charges generally are plea-bargained down to misdemeanors.

Assailants charged with misdemeanor assault seldom are sentenced to jail.

In most cases, domestic assault charges either are dismissed or assailants who plead guilty are placed on probation after receiving stayed sentences.

These generalizations have been verified by an investigation of Carlton County records spanning thousands of documents and cases that ranged from Jan. 1, 1978, through July 1981.

Among items examined were initial complaint reports recorded by dispatchers, followup investigations by the Cloquet Police Department and the Carlton County Sheriff's Department and disposition records of District and County court cases.

Forty-four domestic assault cases were examined: eight from Cloquet, 21 in the county from 1978 through 1980 and 15 from the county in 1981. About 18 county cases between 1978 and 1980 were not examined because of problems in finding some files.

"Violence is a serious matter and jail is an appropriate type of response for people who do violence – whether violence in the family or violence in general,"

said Carlton County Attorney Donald Diesen. "The individual case has to be analyzed. Violence is something that should not be tolerated by society and calls for some severe responses."

But that's not reflected in the record.

In only three of the 44 cases were assailants charged with felonies. In all three cases the felonies were plea-bargained down to misdemeanors. In two of these attacks the assailants used knives; in the third the attacker bound and gagged his estranged wife and allegedly abducted her to Wiscon-

See **Justice** Page 2A

From Page 1A

sin.

Six of the assailants got jail time (one man got only one day); 18 got probation; 13 cases were dismissed; one is still pending. Six were handled in other ways such as mental commitments, fines, deferred prosecution or restraining orders, or they still await judicial action.

Court files show typical reasons for dismissal: The prosecutor and defense agree to a plea bargain, dropping or reducing some of the charges in exchange for a guilty plea; the victim drops charges; the victim becomes an unwilling witness; the prosecutor decides there's no case.

"The court systems over there are enabling men to be violent by not prosecuting them," said LuAnn Dietrich, advocate at the Women's Shelter in Duluth, which has helped a number of Carlton County's battered women.

Joyce Thornton, director of Project HOPE in Cloquet, an advocacy group for abused women, said, "The people we've had are hesitant to go through the court system" in Carlton County, because they're leery of paperwork hassles and the county's reputation for weak prosecution of battering men.

Diesen said, "I can see that these battered women's shelter and women's coalition . . . groups must be very

frustrated. We're also very frustrated. The courts are frustrated. How do we handle this?"

THE JUDGES COMMENT

County Judge Ladean Overlie and Judicial Officer Dale Wolf, an acting county judge, said they've failed to send some domestic assailants to jail who probably should have gone there.

Overlie Wolf

Overlie said, "We just aren't sending them to jail in each and every case. "Granted, I err numerous times; we're human. But there's such a thing as just error. I'm not that smart of a judge, but I'm the most open in Northeastern Minnesota. I stand on my record and put my record up against any judge in the state, the area."

Wolf said, "I hope neither one of us is biased against women. We're just human beings. I wish we had the magic to do a perfect job. We're just part of a system that's not a perfect system."

Overlie, 61, has been county judge for 17 years and was a municipal court judge for 13 years before that. Wolf, 34, is starting his fourth year as judicial officer.

"In overwhelming numbers of (domestic abuse cases) there is chemical abuse," said Overlie. "So, obviously, we're interested in what the family wants us to do. Do they want us to come down as heavy as we can or do we reunite the family?"

JUSTICE: IS IT DENIED BATTERED WOMEN IN CARLTON COUNTY?

Wolf asked, "What's your end goal, to try to reduce the amount of battering of women? We can't undo the

battery. We can't make it up to the lady. Hopefully, what we can do is prevent future things." Therefore, Wolf said, marriage counseling or alcohol treatment often are ordered as conditions of probation.

"I don't want to see one woman battered one little bit," said Overlie. "But I just can't swallow hook, line and sinker" the demands of every special-interest group such as womens' advocates. Advocates assume jail is the answer for everything, he said.

Addressing the advocates, Wolf said, "If you really get too paranoid that the whole system is against you" that can hurt a good cause.

Overlie and Wolf cited three main reasons they most often opt against jail or fines for domestic assailants:

'I can see that these battered womens' shelter and womens' coalition . . . groups must be very frustrated. The courts are frustrated. How do we handle this?'

Donald Diesen,
County attorney

- For most of 1978 through 1980 Carlton County had no jail of its own.
- Fines may exacerbate family friction by putting the spouses in financial trouble.
- Jail terms may aggravate family problems by removing the breadwinner or by fueling hard feelings between spouses.

During the time Carlton County had no jail – about March 1978 through mid-December 1980 – prisoners were shipped to nearby county jails to await hearings or serve

time. That was costly for the county and time-consuming for deputies, Wolf said. At times, the court system had to make appointments for jail time several months in advance with neighboring counties, Wolf said.

"I'll admit there's people I'd have liked to send to jail – if I had a jail," said Wolf.

Wolf's words notwithstanding, court records show no change in sentencing policy after the new jail opened on Dec. 17, 1980.

From January through July of 1981, there were 15 cases of men charged with assault or disorderly conduct after allegedly beating women. (One man was charged two different times.) Seven of the 15 charged either pleaded guilty or agreed to a plea bargain. Two of those men received jail terms: One got 30 days, the other got one day plus a year's probation. Another got 10 days in jail but was given credit for time already served and was freed.

Furthermore, jail officials in three neighboring counties contradict the judges' claim that jails in the area frequently were full from 1978 through 1980.

During the time Carlton County had no jail, the closest one that could accept long-term prisoners was the St. Louis County Jail in Duluth, about 20 miles away. Sheriffs of the two counties had an agreement that Carlton County's long-term prisoners could be housed in Duluth when necessary. That agreement was in effect through August 1980.

"There's always room at the St. Louis County Jail; there has to be," said Jail Administrator Bob Higby. "When you run out of room you make do with what you've got. You just throw another mattress on the floor. If there's something out there that's a detriment to the public . . . there's always room at the county jail."

Since 1923, the total capacity of the St. Louis County Jail has been 136. According to Higby's records, the average daily populations there for the three years Carlton

County had no jail were 89 3 in 1978, 87.9 in 1979 and 106.7 in 1980. Those numbers didn't fluctuate more than 15 prisoners most days of those years, Higby said.

The State Department of Corrections defines a "comfortable capacity" in a jail as 80 percent occupancy (108), Higby said. With the exception of a few two-or three-week periods, the St. Louis County Jail occupancy was well below that 80 percent mark in 1978 and 1979, and "at or close" to that level through 1980, Higby said.

Another jail near Carlton County that accepts long-term prisoners is in Aitkin, 58 miles away. Aitkin County Sheriff Bill Sobey said, "The only time that jail has ever been full has been six or seven years ago. I always have some beds. We never fill them up complete. I always tried to have a bunk or two open so I wouldn't have to turn anybody down." However, Sobey said, from 1978 through 1980 there were some times when it would have strained his capacity to take more prisoners.

A third nearby jail is Crow Wing County's in Brainerd. Crow Wing County Sheriff Chuck Warnberg said he was shipping prisoners out in 1978 and 1979. But since his new jail was opened Feb. 1, 1980, he said, about 65 percent of the days he would have accepted long-term prisoners from Carlton County. On family relationship, Overlie said: "One of the worst things you can do if a couple wants to get together, reconcile and get the family restored is to give a jail sentence."

Said Wolf: "They come out much more sour. He may go over there fuming about that rotton dirty SOB of a gal and come out more dangerous than ever." It's sometimes "a safer route" to give a domestic assailant a stayed sentence, probation and treatment than to jail him, Wolf said.

"Send him to jail for 15 days, let him boil in there and go beat her up again?" asked Diesen's Assistant County Attorney Art Albertson.

"Pure economics" is another reason the judges don't send many domestic assailants to jail, Wolf said. "A women who is dependent on the husband as the bread-winner . . . as soon as the swelling goes down, the reality (sets in). Pretty soon she'll forgive him and try over again."

"You are taking grub off the table, which is going to incite them further," said Overlie.

Dennis Seitz, rural Mahtowa resident and Cloquet attorney with expertise in domestic cases, said, "I'm more upset by the fact the sentencing has been apparently inappropriate. Probably, the courts should sentence more harshly" when a woman pushes her case all the way through the system.

Of the system's officials, Seitz said, "We do have an unbelievable tolerance for violence in our society. Our officials are elected to reflect our community feelings, do our bidding and we get what we deserve."

PEACE OFFICERS 'SENSITIVE'

While the system has flaws, Cloquet police and the Carlton County Sheriff's Department are bright spots for battered women, said Barb Loney, assistant director of Project HOPE. "They are with us and they are pushing for change. They're very sensitive. They are very willing to help. I couldn't be happier." Said Cloquet Police Sgt. Dennis Randelin, " I kind of run hot and cold with the system."

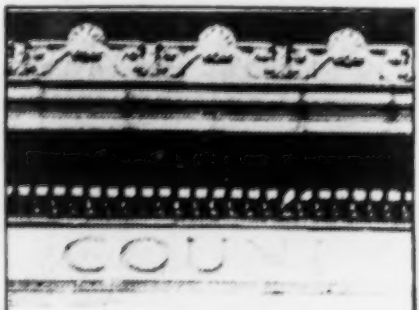
Randelin

Randelin said there are many forces that work against jail terms for domestic assailants, even when peace officers push hard for conviction. Often, the woman changes her mind and drops charges; sometimes, chemical dependency counselors or social workers apply pressure not to jail a man.

Added Randelin: "Or the minister will say, 'Gee whiz, haven't you heard of forgiveness?'

"Women who are really being straight and honest, who want to be protected and are willing to stand by us . . . I think the system takes care of them very well," Randelin said.

Carlton County Sheriff Terry Twomey declared, "I don't think the criminal justice system – period – serves the needs of battered women." Twomey said those women are scared and want immediate, lasting protection. Often, their assailants are hard to track down or post bail quickly and are free to harass them again. It isn't fair to zero in just on Carlton County – other counties have the same problems, Twomey said.



'There's always room at the St. Louis County Jail. If there's something out there that's a detriment to the public . . . there's always room at the county jail.'

Bob Higby,
jail administrator

SERIOUS QUESTIONS RAISED

Several cases that raise serious questions about whether the county vigorously prosecutes and sentences men who batter women surfaced after inspection of the county's law enforcement and court files:

• Henry Wallin's wife, Marjorie, who was in the process of a divorce, alleged that on Sept. 4, 1979, Wallin forced his way into her Cloquet mobile home and beat her in the face with his fists. Then Wallin stuffed her

mouth with paper towels, tying the wad in with baling twine, and bound her hands behind her back, she charged. Wallin drove his wife to his Foxboro, Wis., residence, she alleged, then returned her three hours later.

The Cloquet police officer who investigated her complaint, observed bruises on her cheek and chin. Wallin was charged with false imprisonment, a felony, and misdemeanor assault.

County Attorney Donald Diesen dismissed the felony charge on Nov. 14, 1979, and Wallin pleaded guilty to simple assault. The next day, County Judge Ladean Overlie stayed execution of a 90-day jail term, and gave Wallin one year probation, with the condition he not harass Marjorie at all during that time.

"The jail sentence was hanging over him, which we felt would be adequate," Diesen said.

Overlie said it might have been appropriate to give Wallin a stiffer sentence.

Wolf said one reason Wallin was not sentenced to jail was that he had a herd of milk cows in Wisconsin that might have been harmed had he left them unattended.

• Kenneth K. Clark's wife, Betty, Cloquet, alleged that on Sept. 24, 1979, he beat her and smashed some items in her apartment. The Cloquet Police Department's report contained a color photo of the victim. She suffered a large gash on her left temple plus many scratches and bruises on her face.

Randelin said she had reported one previous domestic assault by Clark, where he allegedly had beaten her with a pair of boots. She dropped charges on that one.

For the Sept. 24 incident, Clark was charged with misdemeanor assault and domestic abuse. Before Wolf he pleaded guilty and was sentenced to 10 days in jail plus a $200 fine. Wolf stayed that sentence for 30 days on the condition Clark contact the county's Human Services Department for marriage counseling.

Overlie said he believes probation violators should be treated "more severely" than first-time domestic assailants. "You should give them close to the maximum (sentence) when there's a violation," Overlie said.

Clark's file shows he never reported for counseling as ordered. He therefore violated his probation and was in contempt of court. The justice system did nothing to punish that contempt, the file reveals.

A memo dated April 29, 1980, placed in Clark's file by a court clerk and addressed to Wolf, stated: "Dale – Do you suppose we should request this person to appear in court? Apparently he never went for marriage counseling. J."

Wolf's written reply was: "No – file, and if he comes in again with similar problem we will proceed on this followup. D.A.W."

Why did Wolf not order Clark to be brought in for contempt after the clerk told him Clark defied his sentence?

"It wasn't brought to my attention for a long time," Wolf said. "I can't really monitor everything, either." Because there were no more domestic" flare-

See **Justice** next page

Justice

From preceding page

ups" reported after Clark was given probation. "I just felt I wasn't going to press the issue," Wolf said. "If he does come in again . . . he probably would be going to jail."

• On June 13, 1981, Howard "Chip" Martin of Cloquet allegedly stabbed his wife, Eleanor, with a knife after beating her and declaring he was going to kill her, said Randelin in a report.

On June 26, Martin was charged with second-degree assault – a felony. The June 13 assault occurred while Martin was still on one year's probation for a Feb. 6,

1981, disorderly conduct conviction, stemming from an incident in which a Cloquet police officer saw him grab Eleanor's neck with his arm while the couple argued.

Juvenile Probation Officer Nadine King recommended against supervised release for Martin, noting he had five prior felony convictions.

The county attorney's office arranged a plea bargain on Aug. 5, reducing the felony to misdemeanor assault. Martin pleaded guilty. District Judge Charles Barnes sentenced Martin to 10 days in jail. Martin already had served that much time awaiting hearings, so the judge set him free.

• On June 15, 1980, Donald G. DeFoe, Cloquet, allegedly threatened to kill Sylvia Smith of Sawyer, then struck her in the throat and knocked her to the ground, she told Deputy Tim Lamminen. While she lay on the ground DeFoe kicked her in the stomach, pulled her hair and struck her in the head, she alleged.

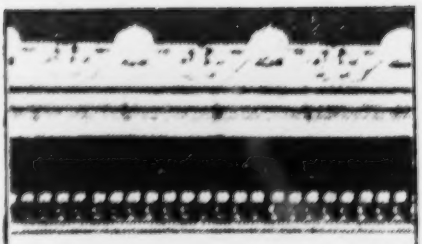
Yet DeFoe was charged with two misdemeanors in connection with Smith's complaint: trespassing and fourth-degree assault. On Sept. 17, 1980, he pleaded guilty and Judge Overlie stayed a 30-day jail sentence, giving DeFoe a year's probation.

On June 17, 1981, while DeFoe was still on probation for the Smith assault, Dorothy Yadon of Cloquet told authorities that DeFoe had beat her. She told Probation Agent Mark Zuber that she and DeFoe had been at his mother's house in Fond du Lac Homes, rural Cloquet, on May 20, 1981, when they had got into an argument.

Yadon told Zuber: "He threw me on the highway on Big Lake Road and he proceeded to beat me." She said he looked for a gun but couldn't find one, "so he grabbed a knife and I ran for the swamp where I laid for half an hour because he was looking for me." She later flagged a friend's car down and was driven to safety, she told Zuber.

Both Yadon and DeFoe failed to appear at an Aug. 18, 1981, probation violation hearing, the court file shows.

Overlie ordered an arrest warrant for DeFoe that day. A hearing was held Oct. 1 but was continued to another date not yet scheduled.



'The court systems over there are enabling men to be violent by not prosecuting them.'

LuAnn Dietrich, women's advocate

PROSECUTION PROBLEMS

• The prospect of having husband and wife accusing each other under oath and of calling children to testify "which parent is lying" forces us to proceed cautiously, Diesen said. Sometimes after a domestic assault, "the family dynamics that can come bursting forth the next day throw the whole (prosecution case) into a cocked hat." Family members may intervene and convince the woman to drop charges; ministers and friends may get involved; apologies may flow and some woman may be quick to forgive.

• The Minnesota Supreme Court suggests prosecutors should be "cautious in blasting into family situations," Diesen said. Where civil remedies are available, they should be considered, he said.

• Because many domestic assaults that reach trial stage involve conflicts in basic one-on-one testimony, "we've got to assess the probability of a conviction," Albertson said. "Juries, in my best estimation, are reluctant to insert themselves into family situations."

• When investigative reports show a domestic assailant has a severe mental or chemical abuse problem, a prosecutor may consider a non-jail remedy for his

behavior, Diesen said, such a commitment to a state institution.

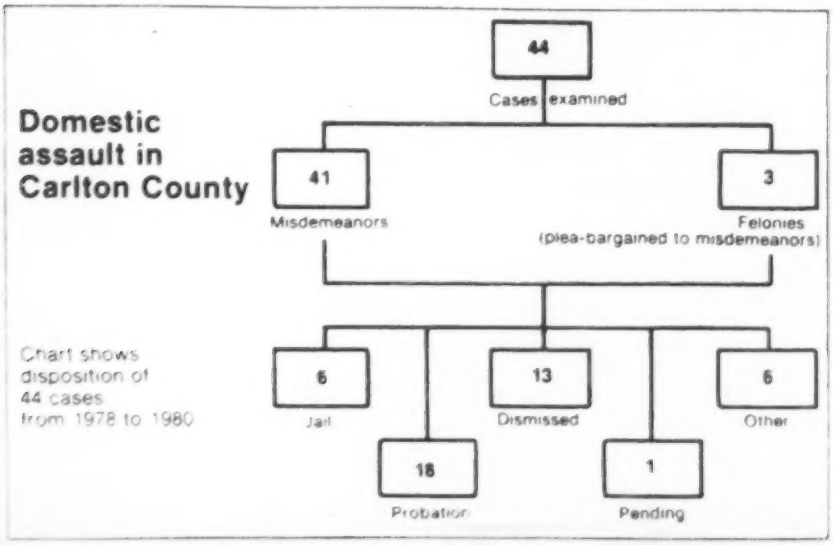
• Then there's the problem of the vascillating witness, some law officers and the prosecutors said. Sometimes a women will call police the day after an assault, having made up with her assailant; and even if she was injured she'll want to drop charges. It's tough to prosecute when the victim is an unwilling witness, Albertson observed.

Following are facts about the Carlton County Court system that are relevant to case flow.

• Diesen had only one assistant, Albertson, from Oct. 1, 1977, until July 20, 1981, when he hired Scott Belfry.

• All misdemeanor prosecution for Cloquet is handled by the city attorney. All Cloquet felonies are handled by the county attorney. Misdemeanors and felonies from the county at large are prosecuted by the Carlton County attorney's office.

• The number of reported domestic assaults is probably less than the total number that actually occurred in Carlton County in a given year. Police and prosecutors agree many women never report assaults by their husbands or boyfriends simply to avoid a social stigma they feel will follow. The News-Tribune study seems to indicate, however, that the number of reported cases has climbed steadily since 1978.



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Sunday, Nov. 15, 1981

D

Justice denied?

The case of Kathy Berglund

Editor's note: Kathy Berglund has married since the events of this story took place and has taken a new surname. However, her experience with the Carlton County legal system occurred before her marriage, so we have used her maiden name, Berglund.

BY JOHN HESSBURG

CARLTON – The man hammered Kathy Berglund's face with his fists and slammed her head through a sheetrock wall. Pinning her arms under his knees, he traced a knife across her throat. He told her she was going to die.

That was Dec. 7, 1979.

Berglund, 33, still feels a rush in her ears as she recounts how Melvin Lester DeFoe beat her during several hours in a jealous rage over her boyfriend.

Berglund, of Cloquet, says DeFoe, father of her three children, also tore through her house, causing considerable damage. And she charges that nine months later, on Labor Day 1980, DeFoe, 41, again attacked her, causing her to break her jaw.

Assaults that involve dangerous weapons or that break bones are felonies under Minnesota law. But DeFoe never stood trial on felony charges, nor was he sentenced to a day in jail, according to court files.

"I feel a great injustice has been done to me," Berglund says. "They bungled the whole thing."

Berglund's story illustrates serious questions about the way Carlton County's legal system prosecutes men who batter women, critics of the system say.

On Dec. 7, 1979, DeFoe burst into her home, Berglund said in a complaint to Carlton County deputies.

He forced her boyfriend to leave, she said, and then beat her, intermittently, for hours.

Shortly before deputies arrived, she said, DeFoe knelt over her on a sofa bed and drew a knife blade across her throat, threatening to kill her. Her son, Todd, then 10, told Carlton County Sheriff Terry Twomey he witnessed the knife attack and much of the beating. DeFoe later pleaded guilty to assaulting Berglund on Dec. 7.

But her story doesn't end there.

Late the night of Sept. 1, 1980, Berglund drove home from a bar and found DeFoe's truck parked in her driveway. She said he hollered something and started after her. He chased her toward the house and tackled her, she said, causing her to break her jaw when she fell on some rocks.

Berglund said she half-ran, half-crawled into her house, with DeFoe not far behind. She said her boyfriend and three children were in the house and saw DeFoe kick her while she lay on the floor.

"The reason, I'm sure, I got my jaw broken was because Melvin wasn't prosecuted the first time," Berglund said. "He doesn't fear the law."

Twomey said DeFoe should have faced felony charges in connection with both assaults.

Contacted twice by telephone, DeFoe refused comment.

BERGLUND: SYSTEM FAILED

Following are some of the points Berglund makes against the Carlton County legal system:

Despite reports by three investigators – including Twomey – of the Dec. 7 assault and damage spree, plus a doctor's verification of wounds and bruises, Berglund's attorney, Thomas Bieter, Duluth, said he had to pressure Carlton County Attorney Donald Diesen into charging DeFoe with two felonies – second-degree assault and

aggravated criminal damage to property. Diesen denies that.

On Feb. 6, 1980, Diesen – without consulting Berglund or Bieter, they said – devised a plea bargain for DeFoe. He dismissed the felonies and DeFoe pleaded guilty to misdemeanor assault.

"I was just flabbergasted when I found out he had gone to court and gotten sentenced," Berglund said. "I wanted to be there to testify. I was very willing."

Said Twomey. "Yes, I agreed with (Berglund) and I still agree that she really probably did not have her day in court. The plea bargain was accepted and certainly she was not consulted. That is true."

Having approved the plea bargain between Diesen and DeFoe's defense attorney, District Judge Charles Barnes on April 30, 1980, stayed execution of a 90-day jail sentence and gave DeFoe 90 days' probation on the condition he complete alcohol treatment at Mash-Ka-Wisen Treatment Center in Saw-

See **Berglund** Page 4D

Berglund: 'I got my jaw broken because Melvin wasn't prosecuted the first time'

From Page 1D

yer.

DeFoe defied Barnes' sentence, according to court records. He showed up at the center three days late, then left on May 5, 1980, after less than a day – a probation violation. Typical treatment usually lasts from 28 to 35 days, according to Mash-Ka-Wisen Administrator Elwin Benton.

But DeFoe was not punished. When he appeared at a followup hearing before Barnes on May 22, 1980, the judge again released him on probation instead of invoking the original 90-day sentence. DeFoe was allowed to go to the Brainerd area to work.

"I think there are many people in the system and on the streets who feel Melvin DeFoe got off very lightly for the kinds of assaults he performed on Kathy and the property. I think I agree with that," Twomey said.

Staff photo by Jack Ferguson

Do battered women see justice done in the Carlton County Courthouse? Some say no.

He added: "I think it would be unfair to zero in on the county attorney's office for the fact (DeFoe) didn't do much time in jail." The sheriff also said DeFoe's probation agent had the responsibility to monitor him during his Mash-Ka-Wisen term.

Probation Agent Mark Zuber refused to comment on DeFoe's case.

• Berglund said Diesen refused to return her telephone calls; she said she called at least 10 times after the first assault. Diesen's secretaries screened all his calls. "I went down there and tried to see him but he wouldn't be there or he wouldn't see me. It's just a total, uncaring, leave-me-alone attitude."

Said Diesen: "I can't recall all the details. This may have taken place. It was a long time ago and I'm not in a position to deny that she may have called and wanted to talk to me. It's very possible."

• Shortly after the first assault, Diesen, via Sheriff Twomey, asked Berglund if she'd take a lie detector test. After consulting her attorney she refused.

"Just the request of the lie detector test was an insult to her," declared Bieter.

• On Sept. 2, 1980, Barnes signed an order that DeFoe be "honorably discharged" from probation. Just the day before, Berglund told deputies, DeFoe allegedly had attacked her again – causing her to break her jaw.

Two charges were issued against DeFoe in connection with the second incident: violation of a restraining order and fourth-degree assault, both misdemeanors. More than a year later, DeFoe still has not been brought to trial; Diesen said that Labor Day assault case is still pending.

"This is, by God, enough time!" said Dale Lucas, Duluth, Berglund's attorney after the second assault. "He's not pushing. How many women in this kind of position have the kind of stamina to put pressure on a

county attorney? Justice delayed, they say, is justice denied."

Diesen wouldn't explain why he didn't charge DeFoe with a felony in connection with the second assault. "Under the code of ethics, we're not supposed to discuss opinions of evidence pending before the court," he said.

About nine hours after what Berglund says was the second assault, two deputies had Berglund sign a statement that said, "I don't remember him (DeFoe) hitting me. It happened so fast." Berglund later said that statement did not reflect her memory of the assault and was taken while she was dazed and on medication.

"Once I wrote that, I couldn't take it back. I couldn't change it. I couldn't do anything. I could have written something like 'Mary had a little lamb' on that paper because afterward I didn't even know what I had written," she said.

Berglund said the statement profoundly hurt her case. Diesen later said the statement was one main reason he decided against a felony charge for the alleged Labor Day assault. In a letter to Twomey Sept. 4, 1980, Diesen wrote, "Although her injuries are substantial, her statements do not indicate that they were inflicted by Melvin. Her version does not rule out an accidental cause for such injuries."

Berglund and DeFoe were mates for almost 10 years and once lived at 1624 Jokela Road in rural St. Louis County. In September 1978 Berglund left him, bought her own home at 1910 Big Lake Road in rural Cloquet and two months later started a civil separation action against him. On June 24, 1981, she married bricklayer Frank Leimer, 36, and they're living in her home with her three children, ages 12, 10 and 6; and his two children, ages 14 and 10.

DECEMBER 7, 1979

The night of Dec. 7, 1979, Berglund had been out to supper with a Cloquet man. They returned to her house about 11:00 p.m. and she went into the bathroom.

"I heard a familiar truck pulling up," Berglund remembered, "I knew the sound of the truck, that it was Melvin DeFoe coming into my yard. He just burst in the door . . . my own home." She heard a brief scuffle; her friend left.

DeFoe kicked his way into the bathroom, she said. "I remember that door just – Bam! – and it sprang open."

"He just came right over across the bathroom and just started whaling, hitting me in the face mostly, with his fists," Berglund said. "He just didn't stop."

Sheriff's department reports confirmed Berglund's story.

After the beating, Berglund told police, DeFoe tore through her home, ripping a phone off the kitchen wall, yanking drawers and scattering silverware, crushing her spare eyeglasses, breaking kettles, smashing a color TV

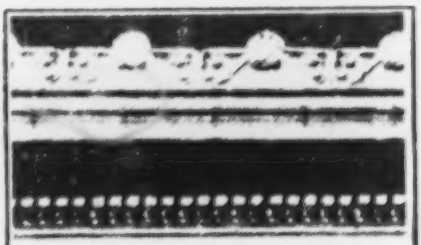
set and stereo and denting a table. Twomey estimated the damage at well over $300, the legal bottom limit for charging a felony.

At one point, DeFoe went into the bathroom and Berglund sneaked into her bedroom to call the police, she said. "I didn't dare talk above a whisper."

DeFoe emerged from the bathroom, his fury undiminished. The pullout couch in the living room was open and he threw her down on it.

Then DeFoe pulled out a pocketknife and traced the blade across her throat, just deep enough to leave a mark, Berglund said.

When deputies arrived, they found the knife in DeFoe's pocket. One officer talked to Berglund's son, Todd, who'd witnessed the knife attack. Then the officers took DeFoe away to St. Louis County Jail; Carlton County had no jail then.



'I recall there was a serious gap as to how these injuries were inflicted. She can't remember specifically him inflicting them. Things happened so fast. That's a pretty serious factor, when it's a burden of proof beyond a reasonable doubt.'

Donald Diesen

DeFoe's attorney Harry Newby Jr. of Cloquet, said his client conceded he went "berserk" the night of Dec. 7 when he came into Berglund's home and allegedly found her in a sex act with her boyfriend while Todd watched from down the hall.

Declared Berglund's attorney Bieter: "My client flatly, absolutely denied that."

Newby reportedly told Diesen about Melvin's accusation and Diesen called Twomey, telling him to ask Berglund if she'd take a lie detector test. Bieter advised her not to.

"It's not right that I should take a lie detector test because I'm the victim," Berglund asserted. "Diesen held that very against me."

On Feb. 8, 1980, Twomey interviewed Berglund while a court reporter took notes. According to a transcript of the conversation, the sheriff told Berglund, "Mr. Diesen indicated to me yesterday that it was his impression that because you did not take a polygraph test that Judge Barnes would be inclined to accept and believe Melvin's version of what happened that night." Berglund then said she'd be willing to take the test to influence DeFoe's sentencing.

"They never mentioned it again," she said.

Diesen said his felony-reduction decision was only slightly influenced by Berglund's refusal to take a polygraph. "I did not pressure her or urge her in any way."

Bieter said: "I think Diesen took the lie detector thing as an opportunity to plea bargain, get rid of the case and avoid a jury trial."

Said Diesen of his test request: "It takes place a number of times, especially when there may be a basic one-on-one dispute as to what happened."

DEFOE IN COURT

Twomey and Diesen signed a criminal complaint against DeFoe on Dec. 10, 1979, citing three charges: second-degree assault (a felony) for the knife attack – maximum sentence of five years and a $5,000 fine; aggravated criminal damage to property (felony) – same maximum sentence; and fourth-degree assault (misdemeanor) for the fist blows to Berglund's face – maximum sentence of 90 days in jail and a $500 fine.

DeFoe sat in St. Louis County Jail from Dec. 7 through Dec. 14, when he posted at $10,000 bond and was released.

DeFoe appeared before District Judge Donald Odden Dec. 19, 1979. Newby requested an omnibus hearing; it was set for Jan. 9, 1980. DeFoe's bail was continued and he was released. An omnibus hearing is held to determine if there is sufficient evidence to try someone for an offense. Also, pre-trial motions are presented at the hearing.

On Jan. 9, the omnibus hearing was rescheduled for Jan. 30; DeFoe remained free on bail.

On Feb. 6, 1980, Diesen offered a plea bargain to DeFoe. The felony charges were dropped in return for a guilty plea to misdemeanor assault. Barnes then ordered a pre-sentence investigation.

On April 30, 1980, Barnes sentenced DeFoe to 90 days' probation, staying execution of a 90-day jail term. The main condition of that probation was that DeFoe enter in-patient treatment for alcohol problems at Mash-Ka-Wisen on May 1, 1980.

Court files show DeFoe didn't show up at Mash-Ka-Wisen until the afternoon of May 4, 1980. Then he left without permission – a probation violation – about midnight May 5, Chemical Dependency Counselor Walter D. Hardy reported the next day.

Barnes signed an arrest order May 7. Barnes denied DeFoe's request for bail that day and DeFoe was sent to jail to await sentencing.

St. Louis County Jail Administrator Bob Higby said his records show DeFoe was in jail from May 6 through May 22, 1980, while awaiting his probation violation hearing.

On May 22, Barnes released DeFoe from jail and renewed his 90 days' probation.

Zuber reported to Barnes that DeFoe was hostile, angry, disliked authority and seemed unwilling to reform his behavior, court files show.

Furthermore, in a May 13, 1980, letter to Barnes, John V. Farrell, counselor at Duluth's Center on Alcohol and Drug Problems, said, "It is the opinion of this counselor that Melvin L. DeFoe is in the early stages of alcoholism . . . It is evident to me that treatment will be necessary for his recovery; either at the present time or some time in the future."

But on Sept. 2, 1980, Barnes signed an order discharging DeFoe from probation.

WHY THE PLEA BARGAIN?

Why did Diesen opt for the plea bargain?

"That's not a very easy question to answer," Diesen said. "It was a very stormy, volatile situation. There was a civil action that was pending at the same time. There was a major consideration as far as a forum for adjusting damage to the property aspect. A great deal of emotions connected with it. The prospects of dragging at least one of their children in as a witness; a number of strong accusations and claims; discrepancies in facts. It was a conclusion reached after examining a lot of different factors."

Said Diesen: "The overall basic reason why I agree to that disposition would be that I felt, considering all of the aspects of it, that justice could be done in a sufficient remedy, or disposition made within the limits of a misdemeanor conviction; and therefore I agreed to it.

"I think my decision to reduce it to a misdemeanor in this DeFoe matter was a judgment call based on many different circumstances. I don't claim infallibility. As far as looking back on what was done, I'm not convinced it was a poor decision."

He continued: "What difference might there have been if we had gone to trial? I don't claim to know what difference there might have been."

Diesen said there were two other reasons why he dropped the felonies: Berglund's boyfriend, who witnessed the Dec. 7 assault, was in Alaska and unavailable for testimony; and calling Berglund's son Todd to court might have harmed him.

The assault aside, Diesen said he chose not to press a felony damage charge because state Supreme Court guidelines, touching the question of property damage claims between former spouses, say that disposition of family disputes often "is better left to the (civil) family court than to the criminal court." Also, civil routes are often quicker, Diesen said.

Summarizing his view of the Berglund-DeFoe case, Diesen said, "You have to consider the devastating effects (a trial) could have, to have the husband and wife in there in the public court, slamming away at each other with accusations, and have a small child caught in the middle: 'Which one of your parents it telling the truth?' The negative effects of dragging a domestic dispute into the courtroom are far more serious, I believe, than in a normal criminal complaint."

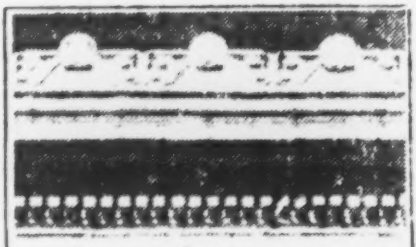
What does Barnes say about approving the plea bargain?

"Our hands are tied on those deals," the judge said. "They're all worked out. My view is simply this: If the prosecution thought they had a weak case . . . we normally do not look behind the plea bargains very far. I handled it just the way I've handle 400 others."

DeFoe's allegation that Berglund was in a sex act when he walked into her house is "a valid defense if you can get a jury to believe it," Barnes said. "Who in the community, of the two of them, is more likely to be received with warmth by a jury? That's always a judgment."

Barnes was asked whether it was proper to release DeFoe on another 90-day probation term after he violated his original probation May 5, 1980, by leaving Mash-Ka-Wisen.

"You do what you know, you think should be done," Barnes said. "We don't automatically put these guys in jail for a probation violation." The judge said DeFoe was released because he had "an assurance of employment."



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Kathy Berglund

SEPTEMBER 1, 1980

The story of what Berglund says was the second beating began on a holiday.

Berglund had had little contact with DeFoe in months, other than when he came to pick up the children for visitation. Then, she said, he'd take the kids and leave quickly. Berglund had been dating a Duluth man for several months that summer.

She and the man took the kids on an outing; then he returned to her home and napped on the couch. She went with her sister to a bar in rural Cloquet. Berglund said she had a few beers and "In came Melvin." They spoke briefly. Later, when she got home, some time between 11

and 11:30 p.m., she noticed DeFoe's truck parked in her driveway.

DeFoe yelled something at her and started after her around the truck.

She started running toward her house and was aware of DeFoe chasing her, she said. "He jumped at me, lunged at me, knocked me to the ground." She said DeFoe landed atop her and she struck her chin with great force on some rocks, breaking her jaw.

"I can remember hearing those rocks. I can hear these sounds in my head. I hear the rocks, my feet on the rocks, the small pea rocks, I can hear that. Then I just scrambled and ran for the house and I could feel that my jaw was loose, It felt like If I opened my mouth the bottom of my face would fall off."

DeFoe followed her as she half-crawled, half-ran into her house. He knocked her to the floor and kicked her while her boyfriend and children watched, she said.

The Carlton County Sheriff's Department investigative report said Berglund "did not remember or see Melvin hit her because everything happened so fast."

She recently explained she said that because she was still in shock from the beating and not thinking clearly. Three days after her jaw was broken she told Twomey she clearly recalled DeFoe leaving his truck and heading toward her before she was knocked to the ground.

"She remembers Melvin coming around the door of his truck and hollering something." Twomey's investigation report said. "She remembers Melvin following her into the living room and kicking her but she felt numb and couldn't feel the pain of the kicks." Twomey also talked to Todd, who confirmed what went on in the house.

In a letter to Twomey on Sept. 4, 1980, Diesen listed six reasons why he would not issue criminal charges in connection with the attack:

- Berglund didn't say who she went with to the bar that night, why her boyfriend stayed home, how long she was there and how much she drank.
- She didn't say who DeFoe was with at the bar, how long he was there or how much he drank.
- She didn't say what she and DeFoe talked about at the bar.
- She didn't say why she went straight home after talking to DeFoe.
- She did not say why DeFoe went to her home, why he'd strike her or take two of the children away with him.
- And "she cannot tell us of any conversation they had at the home, how he injured her or even if he got out of his truck."

Said Lucas: "This is ridiculous. They don't have to do with the actual crimes but are questions that should be brought out in the trial. He's putting himself not only in the job of the county attorney, but the job of a jury."

DIESEN'S DOUBTS

"It's one thing, a question of opinion," Diesen said. "It's also like I told you of the canon of talking about the merits of a case and opinion, and I'm just not free to comment or give opinions on the strengths or weaknesses of that evidence."

What about Berglund's injuries?

"I recall there was a serious gap as to how these injuries were inflicted," Diesen said. "She can't remember specifically him inflicting them. Things happened so fast. That's a pretty serious factor, when it's a burden of proof beyond a reasonable doubt."

After more than a year, why is this misdemeanor assault charge still pending in the courts?

"Simply because the defendant has not been brought in on a warrant," said Diesen's assistant, Art Albertson. However, Overlie said that DeFoe has been in court twice since the assault charge was filed.

And what about Berglund's claims that her rambling written statement was a product of shock and confusion and not her accurate memory of the assault, and that she said she now could make a clearer statement?

"This'll come back to haunt a person in a trial," Diesen said, "when confronted with the burden of proof beyond a reasonable doubt. This throws a cloud over the felony aspect of the charges."

Lucas said he "forced" a meeting with Diesen on Sept. 29, 1980. Present were Kathie Moore and LuAnn Dietrich (advocates from Duluth Women's Shelter) Berglund, Twomey and Lucas. Their purpose was to persuade Diesen to push a felony charge for the Labor Day assault.

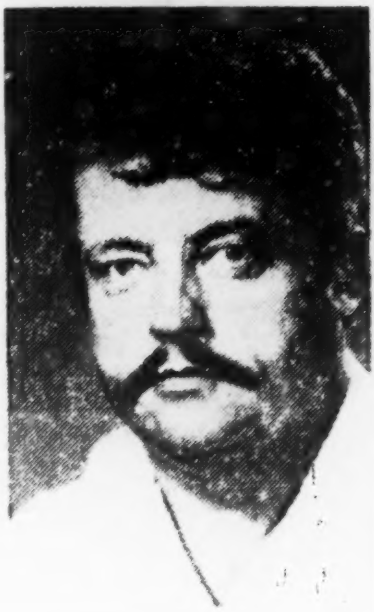
Lucas said Diesen clearly expressed his prosecution philosophy for men who batter women. "He said he was not going to be pushed into prosecuting domestic abuse cases unless there was serious bodily harm. I think what he's looking for is no possible defenses. That type of case he's talking about only comes along every 10 years. Meanwhile, what do you do with the women who are being harmed?

"Diesen said he would not charge the felony because Kathy did not see DeFoe strike her. I thought that was a fairly flimsy excuse. The jury should have decided it – not Don Diesen."

Lucas said Diesen finally agreed under pressure to press a misdemeanor assault against DeFoe for the Sept 1, 1980, incident.

'Yes, I agreed with (Kathy Berglund) and I still agree that she really probably did not have her day in court. The plea bargain was accepted and certainly she was not consulted.'

Sheriff Terry Twomey



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Judge Charles Barnes

Kathy Berglund

focus/editorial
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County Attorney Donald Diesen

Critics say he's not tough on domestic abuse

Donald Diesen

BY JOHN HESSBURG

CARLTON – Critics of Carlton County Attorney Donald Diesen contend he's an obstacle to justice for battered women.

These critics include a number of attorneys and professional women's advocates from Carlton and St. Louis counties.

Critics charge Diesen has ineptly handled battered women's cases through callous treatment of victims, half-hearted prosecution of their complaints, a tendency to demand too much evidence and undue willingness to plea bargain felony assaults down to misdemeanors.

On the other hand, Diesen is seen by supporters – and even some hard-line opponents – as scrupulously honest, a soft-spoken gentleman, a man who works hard and is not controlled by any special interests. Diesen's backers say he's fair-minded and cares deeply about his work.

"I have a job to do, which I try to do as best I can," Diesen said. "I try to accomplish justice. I am proud of the people we have, the level of competency. I don't think I have any reason for any apology for the way our office is being conducted."

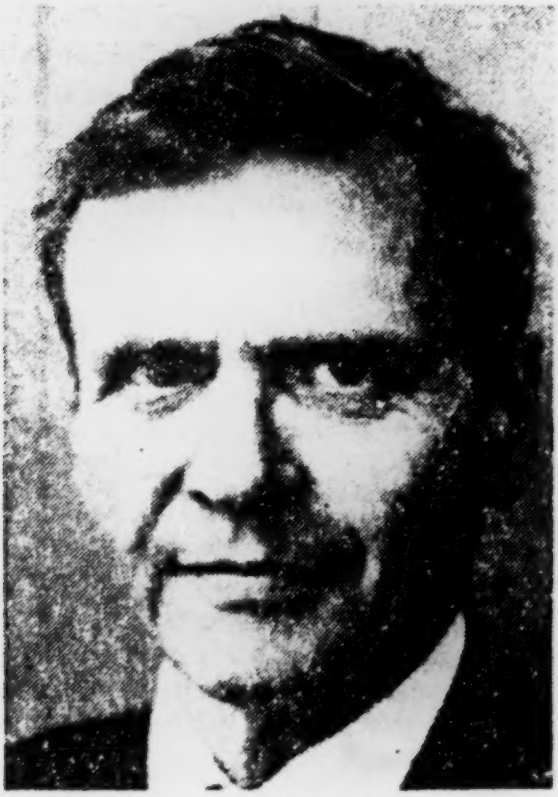
Some accusations of weak prosecution may stem from Diesen's large caseload in recent years, his supporters say. Diesen said that as of Jan. 23, 1981, he had 38 felony cases still pending from late 1980. That number dwindled to 24 on Feb. 12, 1981, to 18 on Feb. 25 and nine on May 13. Diesen has had one assistant, Art Albertson,

since Oct. 1, 1977. He hired a second, Scott Belfry, on July 20, 1981.

Among Diesen's loyalists are Carlton County Sheriff Terry Twomey, Cloquet Police Sgt. Dennis Randelin and some attorneys.

Cloquet attorney Dennis Korman said, "I have a lot of respect for Don Diesen." Along with his private practice, Korman prosecutes some misdemeanors for Cloquet. "I think Don Diesen does an excellent job," he said.

If there have been any rough edges on his record, his huge caseload may be at fault, Korman said. "Don Diesen, frankly, was overloaded. That office was just swamped. It's far more than a two-man office can handle."



Donald Diesen

Diesen, 54, has been Carlton County attorney since April 1, 1970. He faced opposition in 1970 and 1974, but ran unopposed in 1978.

Son of an attorney, Diesen had a private law practice in Cloquet from 1956 through 1970. The prosecutor and wife Patricia have seven children and live in Esko.

He's a trim man of medium height who smokes a lot but still appears fit. That may be because of his distance running. He said he's finished seven marathons, including three Grandma's, and has logged a personal best of 4 hours and 9 minutes.

He speaks softly and wears a hearing aid in each ear.

INSENSITIVE TO WOMEN?

"Female clients of mine have complained that he's not sensitive and that it's difficult for them to get access to the courts," said Fred Friedman, 34, Cloquet resident and Duluth attorney. Friedman has represented a number of Carlton County's battered women and has had frequent contact with Diesen.

Friedman said some of his women clients have said "the conversation, the interview between them is difficult. They found him impatient." One key to responsible prosecution, especially of battered women's cases, is a smooth interview that sets a woman at ease, Friedman said.

"Don Diesen lacks killer instinct," said Dennis Seitz, 42, rural Mahtowa resident and Cloquet attorney who specializes in domestic cases. Seitz also served as an assistant district attorney in Colorado from 1970 through 1974. "When he gets pressure he pushes a case. When there's not too much pressure, he doesn't seem to. In order to be a really good prosecutor, you've got to be able to go for the throat," Seitz said.

Said Diesen: "I guess I'm trying to accomplish justice in the matter and do what should be done based on the

facts and the points that I have presented to me. I don't consider myself unapproachable. In most cases, because of the volume of work going through, I don't have frequent contact with the women."

Attorney Dale Lucas of Duluth's West End Legal Aid said, "I think Don Diesen's attitude is remaining in the dark, the old times. Women in Carlton County who are being abused and battered are paying for his attitudes." Lucas has represented several of Carlton County's battered women who've

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complained of lax prosecution by Diesen.

"Diesen's philosophy is: You have a domestic quarrel – even if it leads to bloodshed – you settle it in the family." Lucas said. "Women in Carlton County who are being abused and battered are paying for (Diesen's) attitudes. He has to enforce the law. And the law is it's a crime to commit domestic violence."

Said Diesen: "I think that my philosophy is the same as the people in general. Violence is a serious matter and jail is an appropriate response for people who do violence, whether violence in the family or violence in general. A factor that a prosecutor should take into account is shielding a victim from humiliation, a court trial if possible . . . and spare a family and victim the trauma of sitting there in the courtroom and slinging away."

Twomey said he's asked Diesen about his philosophy on prosecuting domestic assaults. "The county attorney feels that he does not condone wife beating or wife beaters. His general philosophy is that they be charged . . . and that he recommends some local jail time to the sentencing judge. He may not be satisfying what the Women's Coalition or the battered women, what they

perceive as justice . . . however, I'm not sure the criminal justice system is capable of satisfying "them" because it is, by nature, a "slow, prodding process."

Declared Twomey: "I don't think the criminal justice system – period – serves the needs of battered women."

Diesen cares about battered women's dilemmas, Twomey said, "but he's concerned in a very technical way. He definitely wants a lot of evidence; there's no question about that."

ENFORCING THE LAW

Diesen "is absolutely not enforcing that statute – the Domestic Abuse Act," Lucas said. "I think he is not aggressive enough in prosecution. He's too afraid of losing cases and therefore doesn't bring as many to trial as he should. I think he's got a very old-fashioned attitude about women . . . that criminal law has no place in domestic matters.

"He's clearly saying, 'Don't bother me with them. You take care of them at home.' He has to enforce the law. And that law is it's a crime to commit domestic violence."

Minnesota Supreme Court guidelines are a big factor in his cautious approach to battered women's cases, Diesen said. These guidelines say a prosecutor should be careful not to damage a family, and often there are civil alternatives to criminal charges for a battering.

"That's a fundamental question in a lot of cases," Diesen said "whether to bring a matter to a jury or not. I'm not claiming infallibility. It's a constant learning process. I'm open to suggestions.

Said attorney Thomas Bieter: "I've concluded that Don Diesen does not like to handle domestic relations cases – period." Bieter, a former assistant St. Louis County attorney for 2½ years and public defender from 1972 through 1975, is attorney for Duluth's Women's

Coalition, an advocacy group that's counseled and sheltered many battered women from Carlton County. Bieter also represents the Cloquet Women's Shelter.

"In crimes of violence the county attorney's office . . . should be very vigorous and firm in the prosecution of the case, and they should not be very lenient as far as plea bargaining is concerned," Bieter said. "And secondly, the same policy that applies to violence visited by stranger upon stranger should also apply to the domestic situation."

"A lenient policy is really a condoning of violence. A vigorous policy, on the other hand – I'm absolutely sure that it has a deterrent effect, especially in a divorce situation or a battered woman situation. Judging from (Kathy Berglund's) case, in my opinion, (Diesen) is far too lenient and improper. Timid is a good word – I say that based on this case. He should have a much more vigorous policy in prosecuting crimes of violence, especially the violence (against) the battered woman."

LuAnn Dietrich, advocate for battered women at the Duluth Women's Shelter, has counseled about 20 Carlton County women who've suffered serious beatings in the last two years. Dietrich has met with Diesen at length about one of those clients – Berglund.

Diesen "is not going to prosecute unless the woman is on her deathbed," Dietrich declared.

Kathie Moore, another Women's Shelter advocate who's had close dealings with Diesen and battered women from Carlton County, said, "I know he's not doing his job with battered women. Women don't count (to him), particularly if they're married women. It's putting women back a hundred years into second-class citizenship again. A man like that does not belong in the public system."

Moore works with the Duluth's Women's Shelter, which provides a safe house, counseling an advocacy services to raped and battered women. She's had a

DIESEN'S STYLE

Several attorneys offered opinions on Diesen's professional demeanor, which may reflect on what some perceive as his reluctance to prosecute battered women's cases.

Said attorney Marvin Ketola: "He (Diesen) isn't aggressive; there's no question about that. I've been on both sides of this system." Ketola, a former state representative, is a Carlton County public defender who works with people charged with misdemeanors. He also prosecuted misdemeanors for Cloquet from 1972 through 1976.

"I've heard from law enforcement individuals that they're somewhat disenfranchised" by Diesen's lack of prosecution toughness, Ketola said. However, Ketola noted, police have an interest in seeing arrested people go to jail.

"I have a good relationship with the officers," Diesen maintained.

In 1979 and early 1980 there were some battered women's cases that county deputies said should have been charged as felonies but were made misdemeanors, Twomey said. "My field officers expressed to me a feeling of disappointment and disillusionment; and I guess I shared it in some cases.

"However, I want to make it extremely clear that in the past year I am completely satisfied with the prosecution vigor out of the county attorney's office. It's been an excellent year, an outstanding year."

"The fact that Don doesn't pound the table or scream doesn't mean he's not a good prosecutor," said Robert

Lucas. "Trying a lawsuit is not being a defensive halfback."

CARLTON COUNTY

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Sheriff Terry Twomey

number of clients form Carlton County, who she says have been bitterly dissatisfied with Diesen.

"Having been personally involved with the women whose lives he's affected, I have to say that he is an active detriment in his office. It appears his ego is at stake every time somebody comes in there to make a complaint. And unless it's a shut-tight case where he has every chance of coming out – hey, the hero! – then forget it; he doesn't want to mess around with it."

Diesen rejected charges that he shies away from aggressive prosecution of men who batter women. "Well, I deny that; that's not the case. I process those and any kind of cases in the same manner as other criminal offenses."

Friedman said of Diesen: "There's nothing strong about his won-lost record. There's nothing there to defend."

Moore said, "I think he (Diesen) has got a real ego involvement there, that every case he takes he wants to be a winner. With battered women you don't always have winners."

PLEA BARGAINS

Some of Diesen's detractors say battered women never will be winners in Carlton County as long as Diesen keeps arranging plea bargains in serious assault cases.

"I have more success cutting a deal out there (Carlton County) than I do here" in St. Louis County, Friedman said. "The people out there don't want to go to trial. I've had all sorts of last-minute deals."

Responded Diesen: "That sounds pretty incredible. That's a very surprising statement. In the criminal justice system, most cases are disposed of before trial. A prosecutor is not supposed to charge something that you have no reasonable expectations that you could prove."

Friedman continued: "In my opinion (Diesen) is aggressive in charging cases out. But he charges a lot of crap that never goes anywhere. Once you make a decision to charge something out then you go with it. Don't change felonies if you're going to plea-bargain them out in six weeks."

Diesen opts for plea bargains "not only too easily, too early and easier than other prosecutors," Friedman said.

"Don isn't the greatest trial lawyer in the world, but he's a very bright fellow," said Robert E. Lucas, 48, a Duluth attorney. "I've always found Don to be a fair-minded guy. He's not been a pushover. I think Don Diesen is a competent prosecutor. He is a sound lawyer and a concerned person, a good and wholesome person. I have respect for Don Diesen."

Several courthouse observers from Duluth and Carlton County, including some Diesen backers, say he's not a dynamic courtroom lawyer, which may reflect on his reluctance to charge felonies for domestic assault. Part of Diesen's problem may be his hearing impairment, one man says.

"Put yourself in Don's place. How do you argue in the courtroom when you only hear half of the conversation?" said Randelin. "He has a terrible hearing problem. Don reads lips. In a courtroom defense attorneys . . . they intentionally turn their backs on Don. They intentionally stand up and step ahead of him so he can't hear."

Diesen insisted his hearing problem doesn't prevent effective prosecution. "The primary thing is that the job be done," Diesen declared. "The job is being done."

Diesen "gives no leadership or direction," said Seitz, a Cloquet attorney who specializes in domestic cases. "He's a nice, quiet gentleman but he doesn't run an active office. I don't see him active in felonies, certainly not in terms of providing direction."